NORTH CAROLINA LAW REVIEW

Volume 76 | Number 3 Article 3

3-1-1998

The Brownfields Property Reuse Act of 1997: North Carolina Creates an Additional Incentive to Reclaim Contaminated Properties

David B. Hawley

NOTES

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Just south of downtown Charlotte, North Carolina, lies an area called South End that serves a variety of land uses, including low- to moderate-income housing, commercial and retail establishments, and industrial sites.[1] Historically, the area has been used for industrial and commercial purposes, beginning in the late 1800s as one of Charlotte's earliest industrial locations.[2] As the city developed and expanded, however, owners abandoned many of these industrial and commercial sites or left them unused.[3] Some of these sites contain soil and groundwater contaminated with hazardous or toxic materials, creating a situation in which owners or prospective purchasers are reluctant to redevelop the sites for fear of incurring environmental cleanup liability and extensive cleanup costs.[4] These sites often remain untouched, contributing to the decay of the area and creating concern among its residents about the potential harms of contamination.[5] The sites are known as "brownfields."[6]

The situation is changing, however. Realtors and property developers have begun to redevelop these abandoned industrial properties.[7] The City of Charlotte, with a pilot grant from the U.S. Environmental Protection Agency (the "EPA"), is assisting with the development of remediation[8] and cleanup plans for certain sites.[9]

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1. *See* Bruce Henderson, *Charlotte Seeks $200,000 Grant to Redevelop Industrial Areas*, CHARLOTTE OBSERVER, Mar. 22, 1996, at C1 (describing the South End area of Charlotte where abandoned industrial sites are located); Doug Smith, *South End Gets Help with Leftover Hazards*, CHARLOTTE OBSERVER, Nov. 10, 1996, at D1 (same).

2. *See* U.S. EPA, EPA 500-F-97-008, NATIONAL BROWNFIELDS ASSESSMENT PILOT: CHARLOTTE, NC 1 (1997); Henderson, *supra* note 1, at C1.

3. *See* Henderson, *supra* note 1, at C1.

4. *See* Taylor Batten, *Polluters, Not Developers, May Pay for Brownfields*, CHARLOTTE OBSERVER, July 27, 1997, at M22; Henderson, *supra* note 1, at C1; Smith, *supra* note 1, at D1.

5. *See* Henderson, *supra* note 1, at C1; Smith, *supra* note 1, at D1.

6. *See infra* text accompanying note 16 (defining "brownfields").

7. *See* Henderson, *supra* note 1, at C1.

8. "Remediation" generally means action to clean up or control the release of contaminants from contaminated property to protect public health or the environment. *See* N.C. GEN. STAT. § 130A-310.31(b)(13) (1997).

Because of this activity, the area is undergoing an "urban renaissance," with new commercial and residential activity opening in historic buildings.[10] The North Carolina General Assembly, in response to concerns from business and industry organizations and certain local governments,[11] recently adopted an additional tool for addressing redevelopment of contaminated sites such as those found in South End: The Brownfields Property Reuse Act of 1997.[12]

This Note examines the recently enacted Brownfields Property Reuse Act of 1997 (the "Act") and the problems involved in cleaning up contaminated urban industrial sites that led to the passage of the Act and other initiatives nationwide.[13] It briefly reviews the history of the Act, examining in detail its main provisions, and summarizes the concepts underlying the new law.[14] Finally, the Note comments on the measures adopted by the North Carolina legislature, particularly as they compare to measures in other similar state programs and brownfield-program models, and assesses whether the North Carolina measures will aid in redeveloping brownfield areas.[15]

Brownfields generally are defined as "[a]bandoned, idled, or under-used industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination."[16] Estimates of the number of brownfields

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9. *See* U.S. EPA, *supra* note 2, at 1-2.

10. *See* Kevin R. Boyer, *Regulators Look at Ways to Put Contaminated Property Back to Work*, N.C. ENVTL. L. LETTER, Aug. 1996, *available in* LEXIS, ENVIRN Library, CURNWS File.

11. Telephone Interview with Rep. Daniel F. McComas, North Carolina House of Representatives (Sept. 12, 1997) [hereinafter McComas Interview]; Telephone Interview with Richard Whisnant, General Counsel, North Carolina Department of Environment and Natural Resources (Sept. 12, 1997) [hereinafter Whisnant Interview]. The name of the state agency responsible for administering the Brownfields Property Reuse Act, as used in the legislation, is the Department of Environment, Health and Natural Resources ("DEHNR"). *See* Brownfields Property Reuse Act of 1997, ch. 357, 1997 N.C. Adv. Legis. Serv. 244. The General Assembly changed the agency's name to the Department of Environment and Natural Resources during the 1997 legislative session as part of the state's 1997 Appropriations Act. *See* The Current Operations and Capital Improvements Appropriations Act of 1997, ch. 443, pt. XIA, subpts. 1-2, 1997 N.C. Adv. Legis Serv. 323, 465-568. The new name and its acronym ("DENR") are used throughout this Note.

12. Brownfields Property Reuse Act of 1997, ch. 357, 1997 N.C. Adv. Legis. Serv. 244 (codified as amended at N.C. GEN. STAT. §§ 130A-310.30 to .40 (1997)).

13. *See infra* notes 16-68 and accompanying text.

14. *See infra* notes 69-149 and accompanying text.

15. *See infra* notes 150-228 and accompanying text.

16. Office of Solid Waste and Emergency Response, U.S. EPA, *Brownfields Glossary of Terms* (last modified Sept. 30, 1997) <http://www.epa.gov/swerosps/bf/glossary.htm#brow>. Commentators and authors reviewing state cleanup initiatives tend to group "voluntary cleanup" and "brownfields" programs together in discussing the features of the state programs. *See, e.g.*, Anne Slaughter Andrew, *Brownfield*

nationwide vary from 150,000 sites[17] to nearly 450,000 sites.[18] North Carolina environmental regulatory agencies have not surveyed the state to determine the number of potential brownfield sites,[19] although commentators estimate that approximately 1000 sites exist in the state.[20] Although a brownfield may exist in any location, most appear in older urban areas where industry once flourished but has declined.[21] Contamination at brownfields sites may range from low or moderate to extremely hazardous, but most of these sites do not involve, or have not been evaluated as having, contamination at levels that would trigger inclusion on federal or state priority cleanup lists.[22] Even at low contamination levels, however, owners and potential developers of these sites often are reluctant to remediate the sites "due to serious concerns involving possible environmental contamination, including difficult and costly cleanup requirements, uncertain cleanup standards, liability, and unavailable financing."[23] The absence of redevelopment efforts for brownfields contributes to a number of problems, including reductions in urban area economic

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Redevelopment: A State-Led Reform of Superfund Liability, NAT. RESOURCES & ENV'T, Winter 1996, at 27, 28 (discussing state "voluntary cleanup" programs used to remediate "brownfield" sites); *cf.* M. Ann Bradley & David L. Yaussy, *The Voluntary Remediation and Redevelopment Act—West Virginia Restructures Environmental Liability*, 99 W. VA. L. REV. 455, 458 n.10 (1997) (noting that in West Virginia's voluntary cleanup act, the term "brownfields" connotes a subset of voluntary remediation sites). This Note does not differentiate between state programs based on nomenclature, or whether a program was specifically enacted as a "brownfields" program. It addresses elements found in both types of programs in relation to the elements of the Act.

17. *See* U.S. GEN. ACCOUNTING OFFICE, GAO/RCED 96-125, SUPERFUND—BARRIERS TO BROWNFIELD REDEVELOPMENT 4 (1996).

18. *See* OFFICE OF TECH. ASSESSMENT, U.S. CONGRESS, STATE OF THE STATES ON BROWNFIELDS: PROGRAMS FOR CLEANUP AND REUSE OF CONTAMINATED SITES 2 (1995).

19. Telephone Interview with Grover Nicholson, Head, Federal Remediation Branch, Superfund Section, Division of Waste Management, North Carolina Department of Environment and Natural Resources (Sept. 16, 1997) [hereinafter Nicholson Interview].

20. *See* Charles Case & Peter Anderson, *North Carolina's Efforts to Recycle Brownfields*, 10 N.C. LAW. WKLY. 653, Supp. at 4 (1997).

21. *See* Bernard A. Weintraub & Sy Gruza, *The Redevelopment of Brownsites*, NAT. RESOURCES & ENV'T, Spring 1995, at 57, 57.

22. *See* OFFICE OF TECH. ASSESSMENT, U.S. CONGRESS, *supra* note 18, at 4; *see also* 42 U.S.C. § 9605(c) (1994) (requiring the establishment of a hazard ranking system for inclusion of contaminated sites on the federal National Priority List); N.C. GEN. STAT. § 130A-310.2 (1996) (requiring the establishment of a state Inactive Hazardous Waste Site Priority List for allocating state resources for remediation of contaminated sites); 40 C.F.R. pt. 300, app. A (1997) (describing the methodology for applying the hazard ranking system to place sites on the National Priority List).

23. OFFICE OF TECH. ASSESSMENT, U.S. CONGRESS, *supra* note 18, at 5.

development and employment opportunities;[24] reductions in urban tax bases;[25] possible contamination of drinking water supplies and neighborhood health problems;[26] increased dumping of potential environmental and public health hazards;[27] perpetuation of "environmental justice" problems involving low-income and minority neighborhoods;[28] and increases in "urban sprawl" and the use of

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24. *See id.* In a recent article, James T. O'Reilly described the disruptive effects that the abandonment of urban industrial sites has had on urban workers and employment:

> The sites and the buildings remain, but the recycling has stopped. Manufacturing jobs have not stayed in the inner city. The social isolation of city neighborhoods, cited by critics of environmental racism, deepened as neighborhood jobs departed. The disconnection of inner-city residents from these relocated sites was amplified by underfunded urban transportation systems.... Manufacturing shift workers and those who want overtime incentive pay find it difficult to use public transportation to get to distant sites at unusual hours. The price of automobile transportation increased very significantly during the 1970s and 1980s, outpacing the income growth for the manufacturing worker.... Therefore inner-city residents are less likely to be able to travel out to distant job sites via personal automobiles.

James T. O'Reilly, *Environmental Racism, Site Cleanup and Inner-City Jobs: Indiana's Urban In-Fill Incentives*, 11 YALE J. ON REG. 43, 47-48 (1994). On a more encouraging note, a 1996 study by the Michigan Department of Environmental Quality of the effects of that state's modified brownfields-cleanup law indicated that out of 32 municipalities surveyed, 19 reported a total of "$200 million in private investment in ... Brownfields properties ... [and] the creation of 2,070 new jobs" after the law was changed to encourage brownfields redevelopment. Robert H. Abrams, *Superfund and the Evolution of Brownfields*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 265, 286 (1997).

25. *See* R. Michael Sweeney, *Brownfields Restoration and Voluntary Cleanup Legislation*, 2 ENVTL. LAW. 101, 107 (1995). When an industrial site is abandoned by its owner, the municipality where the brownfield site is located "bear[s] some of the cost of the contamination because the abandonment reduces the host municipality's tax base and the jobs that are available in the town, and may result in depressed property values in the vicinity of the contaminated site." Terry J. Tondro, *Reclaiming Brownfields to Save Greenfields: Shifting the Environmental Risks of Acquiring and Reusing Contaminated Land*, 27 CONN. L. REV. 789, 817 (1995).

26. *See* Joel B. Eisen, *'Brownfields of Dreams'?: Challenges and Limits of Voluntary Cleanup Programs and Incentives*, 1996 U. ILL. L. REV. 883, 895. At some brownfield sites, as at any site where contaminants are not contained, "[e]xposure to harmful, and often carcinogenic, substances can occur when children play at an abandoned site, when runoff or migration spreads the contamination to neighboring properties, or through a number of other pathways." Andrea Lee Rimer, *Environmental Liability and the Brownfields Phenomenon: An Analysis of Federal Options for Redevelopment*, 10 TUL. ENVTL. L.J. 63, 68-69 (1996).

27. *See* Eisen, *supra* note 26, at 895.

28. *See id.* The issue of environmental justice generally involves the potential for "disproportionately high and adverse human health or environmental effects ... on minority populations and low-income populations," Exec. Order No. 12,898, 59 Fed. Reg. 7629, 7629 (1994), because of the siting or development near those populations of projects that may involve environmental and public health risks. For a comprehensive evaluation of brownfields initiatives and their relation to environmental justice, see NATIONAL ENVTL. JUSTICE ADVISORY COUNCIL, U.S. EPA, EPA 500-R-96-002, ENVIRONMENTAL

undeveloped suburban and rural areas for industrial development.[29]

The factors that limit development of brownfields areas stem primarily from the application of the provisions of the federal Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"),[30] and similar laws enacted at the state level.[31] These laws were established to ensure that responsibility for

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JUSTICE, URBAN REVITALIZATION, AND BROWNFIELDS: THE SEARCH FOR AUTHENTIC SIGNS OF HOPE (1996). *See generally* William W. Buzbee, *Brownfields, Environmental Federalism, and Institutional Determinism*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 1, 18-19 (1997) (describing in general the environmental justice concerns regarding brownfields); Anne L. Kelly, *Reinvention in the Name of Environmental Justice: A View from State Government*, 14 VA. ENVTL. L.J. 769, 780 (1995) (describing the arguments on brownfields redevelopment between brownfields redevelopment advocates and environmental justice advocates). Commentators are divided over whether brownfields legislation and brownfields redevelopment improve environmental conditions in low-income and minority areas, or whether they exacerbate environmental justice problems. *See* Eisen, *supra* note 26, at 1002-03 (commenting that brownfields projects "may perpetuate environmental inequities by increasing the high degree of risk that affected communities are already forced to bear"); Leslie Goff-Sanders, *Brownfield Legislation: A Viable Option for the Southeast*, 12 J. NAT. RESOURCES & ENVTL. L. 141, 146 (1996-97) ("So long as state legislatures avoid implementing cleanup standards that are too relaxed in urban areas, the revitalization of the urban areas should please both environmental justice advocates and urban redevelopment advocates."); Samara F. Swanston, *An Environmental Justice Perspective on Superfund Reauthorization*, 9 ST. JOHN'S J. LEGAL COMMENT. 565, 572 (1994) (arguing that flexible cleanup standards for brownfields will increase risks to poor and minority communities).

29. *See* Eisen, *supra* note 26, at 895-97. The development of these "greenfield" areas (previously undeveloped suburban and rural areas) rather than reuse of brownfields sites is economically driven, given that studies have found development of brownfields to be "as much as four times more expensive than construction in 'greenfields.' " CHARLES BARTSCH & ELIZABETH COLLATON, BROWNFIELDS: CLEANING AND REUSING CONTAMINATED PROPERTIES 3 (1997); *see also* Abrams, *supra* note 24, at 277-84 (discussing the economic considerations in developing brownfields or greenfields). Bartsch and Collaton quote an unidentified Illinois real estate developer as stating simply that " '[t]he numbers just make sense that way,' " when referring to the development of greenfields rather than brownfields. *See* BARTSCH & COLLATON, *supra*, at 3 (quoting an unidentified Illinois real estate developer).

30. 42 U.S.C.A. §§ 9601-75 (West 1995 & Supp. 1997); *see also* Andrew, *supra* note 16, at 27 ("[T]here is no doubt that the rubric of 'brownfield redevelopment' is being utilized in a state-driven agenda to 'reform,' at both the state and federal levels, the general liability scheme imposed by CERCLA to address contaminated sites in this country."). Although CERCLA is commonly known as "Superfund," the Superfund portion of the law is actually the federal fund used to pay for the cleanup of major hazardous substance contamination and other activities under CERCLA. *See* 26 U.S.C.A. § 9507 (West Supp. 1997) (creating the Hazardous Substance Superfund). The monies for the fund come from taxes imposed on certain petroleum products, *see* 26 U.S.C.A. § 4611 (West Supp. 1997), and chemicals, *see* 26 U.S.C. § 4661 (1994).

31. *See, e.g.*, 415 ILL. COMP. STAT. ANN. 5/22-2 (West 1997) (establishing the state's Hazardous Waste Fund and the liability of certain parties for hazardous substance contamination); MASS. ANN. LAWS ch. 21E, §§ 1-18 (Law Co-op. 1996 & Supp. 1997) (creating the Massachusetts Oil and Hazardous Material Release Prevention Act); N.C.

cleaning up sites contaminated by hazardous materials would fall on those parties primarily responsible for the contamination.[32] In attempting to reach the parties responsible (and thus have the polluter pay for remediation), the laws impose expansive liability for cleanup costs on a broad range of entities that may have contributed to the contamination.[33] In the case of CERCLA, and many of the state "mini-CERCLA" laws, "courts have imposed strict, joint and several liability on those associated with contaminated property,"[34] including later purchasers of the property or lenders who had no connection with the original contamination.[35] The result has been that "parties try to avoid owning contaminated (or seemingly contaminated) property, which then encourages the development of previously unused and pristine property . . . , and discourages the development of abandoned industrial property."[36]

The liability consequences of CERCLA mean that the purchaser of the property may be liable for all of the EPA's cleanup costs and may be required to reimburse other liable parties for their cleanup

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GEN. STAT. §§ 130A-310 to -310.13 (1997) (creating the state Inactive Hazardous Sites Response Act).

32. *See* United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982) ("Congress intended [through CERCLA] that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created."); *see also* Musicland Group, Inc. v. Ceridian Corp., 508 N.W.2d 524, 529 (Minn. Ct. App. 1993) (commenting that the Minnesota Environmental Response and Liability Act was modeled after CERCLA and was designed to "impose strict liability on those responsible for harm caused by the release of hazardous substances").

33. *See* 42 U.S.C. § 9607(a) (1994) (identifying the persons responsible for cleanup and remediation under CERCLA); N.C. GEN. STAT. § 130A-310.7 (1997) (identifying persons responsible for cleanup under the state's Inactive Hazardous Sites Response Act); New York v. Shore Realty Corp., 759 F.2d 1032, 1043-44 (2d Cir. 1985) (finding that CERCLA imposes strict liability on a current owner of contaminated facility or site regardless of causation); BROWNFIELDS: A COMPREHENSIVE GUIDE TO REDEVELOPING CONTAMINATED PROPERTY 15-16 (Todd S. Davis & Kevin D. Margolis eds., 1997) (noting that a diverse number of parties may be subject to liability).

34. Eugene E. Smary & Daniel K. DeWitt, *Learning from Our Mistakes: Brownfields Redevelopment, in* 1997 WILEY ENVIRONMENTAL LAW UPDATE 267, 270 (Carole Stern & Christian Volz eds., 1997); *see also* Control Data Corp. v. S.C.S.C. Corp., 53 F.3d 930, 934 n.4 (8th Cir. 1995) (noting that if liability is proven in an action by the federal government to recover response costs, "all of the defendants are jointly and severally liable, unless a particular defendant can establish that his harm is divisible, a very difficult proposition" (citing Farmland Indus. v. Morrison-Quirk Grain Corp., 987 F.2d 1335, 1340, 1342 n.6 (8th Cir. 1993); United States v. Alcan Aluminum Corp., 964 F.2d 252, 267-71 (3d Cir. 1992))).

35. *See* United States v. Fleet Factors Corp., 910 F.2d 1550, 1557 (11th Cir. 1990) (holding that secured creditors may be liable under CERCLA even though they are not operators at a contaminated site).

36. Smary & DeWitt, *supra* note 34, at 268.

costs, unless an investigation of a property shows no contamination or contamination resulting from third-party action outside the chain of title.[37] The costs for cleanup imposed on owners and purchasers of contaminated property can be significant. The cleanup standards under CERCLA[38] (and most similar state laws) require the performance of detailed assessments at each site.[39] Standards may vary depending upon the site and the type of contamination present, with remediation usually required to meet "all 'applicable' and 'relevant and appropriate' federal and state standards."[40] Consequently, cleanups often have been conducted cautiously under stringent standards to ensure minimum risk exposure to future uses from contamination.[41] Estimates of the costs to conduct cleanups of this nature "range from tens of thousands of dollars into the millions of dollars for particularly hazardous sites,"[42] with site assessments alone reaching levels of $210,000.[43]

In response to the liability concerns expressed by purchasers of contaminated properties and lenders involved in such purchases, Congress amended CERCLA to reduce the potential for extended liability, including relief from liability for "innocent landowners" of contaminated property,[44] and, most recently, protection for lenders

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37. *See* Scott H. Reisch, *Reaping "Green" Harvests from "Brownfields": Avoiding Lender Liability at Contaminated Sites* (pt. 1), COLO. LAW., Jan. 1997, at 3, 3 [hereinafter Reisch, *Part I*].

38. *See* 42 U.S.C. § 9621 (1994).

39. *See* Eisen, *supra* note 26, at 907-08.

40. BROWNFIELDS: A COMPREHENSIVE GUIDE TO REDEVELOPING CONTAMINATED PROPERTY, *supra* note 33, at 24 (quoting, in part, 42 U.S.C. § 9621(d)(2)(A) (1994)).

41. *See id.* at 24 & 38 n.137. The authors note that "until recently, [the EPA] tended to assume in its risk assessment that the groundwater [at a contaminated site] would be used as a drinking water source." *Id.* at 38 n.137; *see also* Smary & DeWitt, *supra* note 34, at 285 ("EPA has often assumed that contaminated properties should be cleaned up to levels suitable for residential living . . . [, thus making] the cost of remediating many sites . . . exorbitant and impractical . . . ."). State cleanup programs similar to CERCLA often suffer from similar limitations, thus reducing the likelihood that potential redevelopers of brownfields properties will do so. One commentator has noted that

> many state cleanup standards are based upon the federal model and, as such, are also overburdensome and unrealistic. Many states require cleanup to background levels, not taking into account the intended use of the land. This discourages voluntary site cleanups because the cost of cleaning up a site to pristine conditions usually exceeds the value of the property.

Mark D. Anderson, *The State Voluntary Cleanup Program Alternative*, NAT. RESOURCES & ENV'T, Winter 1996, at 22, 23.

42. OFFICE OF TECH. ASSESSMENT, U.S. CONGRESS, *supra* note 18, at 8.

43. *See* U.S. GEN. ACCOUNTING OFFICE, *supra* note 17, at 9.

44. *See* 42 U.S.C. § 9607(b)(3) (1994); *id.* § 9601(35)(A)-(B). The defense of an "innocent landowner," however, generally is limited to instances in which the landowner

from liability based on a lender's capacity to influence or its right to control actions at contaminated sites.[45] These reforms may help reduce the reluctance of prospective purchasers and lenders to become involved in brownfield redevelopment.[46] It is unclear, however, whether relief from potential liability, particularly for lenders, will trigger substantial investment in brownfield redevelopment.[47] For example, one commentator has noted that regardless of these reforms, lenders still may be concerned "about borrowers' solvency due to CERCLA liabilities or business ventures of questionable economic viability."[48]

In addition to the CERCLA reforms of past years, legislation was introduced in Congress in 1997 that would establish a number of federal programs designed to encourage brownfield redevelopment and, in some instances, limit the liability of prospective purchasers of

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obtained the property without knowledge of the contamination and after conducting an inquiry into potential contamination. *See id.* § 9601(35)(A)(i), (B).

45. *See* Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, Pub. L. No. 104-208, Div. A, Title II, Subtitle E, 110 Stat. 3009, 3009-462 to -467 (codified at 42 U.S.C.A. § 9607(n) (West Supp. 1997)) (creating a "safe harbor" to limit lender liability under CERCLA). Congress's action was prompted in part by the decisions in two federal cases addressing the "secured creditor" exemption provision of CERCLA, which provides that secured creditors that do not participate in managing a contaminated site are exempt from CERCLA liability. The first case, *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990), held that "a secured creditor may incur [CERCLA] liability, without being an operator, by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes." *Id.* at 1557 (footnote omitted). The second case, *Kelly v. United States EPA*, 15 F.3d 1100 (D.C. Cir. 1994), vacated the EPA's attempt to interpret the secured creditor exemption to provide protection for certain lenders from CERCLA liability. *See id.* at 1109. The results of these cases sent a chill through the lending community and created uncertainty regarding participation in the remediation of contaminated sites. *See* Reisch, *Part 1*, *supra* note 37, at 4. For further discussion of the history leading up to the 1996 amendments that provided lender relief and a description of the amendments, see generally William W. Buzbee, *CERCLA's New Safe Harbors for Banks, Lenders, and Fiduciaries*, 26 ENVTL. L. REP. (Envtl. L. Inst.) 10,656 (Dec. 1996), Joseph M. Macchione, *Lender Liability Under CERCLA in Light of the Asset Conservation, Lender Liability and Deposit Insurance Protection Act of 1996: Does the Act Spell Lender Relief or Continued Heartburn?*, 16 TEMP. ENVTL. L. & TECH. J. 81, 101-05, 112 (1997), and Scott H. Reisch, *Reaping "Green" Harvests from "Brownfields": Avoiding Lender Liability at Contaminated Sites* (pt. 2), COLO. LAW., Feb. 1997, at 9, 9-10 [hereinafter Reisch, *Part 2*].

46. *See* Reisch, *Part 2*, *supra* note 45, at 10.

47. *See* Buzbee, *supra* note 45, at 10,662.

48. *Id.* at 10,663. Professor Buzbee notes that "[m]any disincentives to brownfield investment remain that are unrelated to environmental liability concerns. Although brownfields concerns played a role in allowing lenders to obtain CERCLA relief, it remains an open question whether banks will now seek out opportunities to finance brownfield-rehabilitation efforts." *Id.*

brownfield properties.[49] Although none of the bills has been enacted at this time, Congress has adopted legislation that allows a taxpayer to treat certain remediation expenditures related to particular brownfield sites as an expense not chargeable to capital accounts that may be deducted in the tax year of the expenditure.[50]

The EPA also has taken a number of steps to enhance the likelihood of brownfields redevelopment. The most notable is the agency's Brownfield Economic Redevelopment Initiative (the

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49. *See, e.g.*, H.R. 1392, 105th Cong. (1997) (creating the Brownfields Reuse and Real Estate Development Act); H.R. 1120, 105th Cong. (1997) (creating the Community Revitalization and Brownfield Cleanup Act of 1997); S. 18, 105th Cong. (1997) (creating the Brownfields and Environmental Cleanup Act of 1997). Several of the brownfields bills were introduced as a result of congressional frustration with the lack of progress in CERCLA reform efforts. *See Superfund: Majority Leader Backs Commerce GOP in Merge of Brownfields with Broad Bill*, Nat'l Env't Daily (BNA), at D-2 (Sept. 3, 1997), *available in* WESTLAW, BNA-NED database. Because of partisan differences on the need for stand-alone brownfields bills, however, it is unlikely that any of the individual bills will pass, although some of their provisions or other brownfield measures may be enacted as part of a CERCLA reform bill. *See id.*; *see also Superfund: Boehlert Schedules Markup Date for Bill Despite Differences with Democrats*, Nat'l Env't Daily (BNA), at D-6 (Nov. 7, 1997), *available in* WESTLAW, BNA-NED database (indicating that House Superfund reform bill would establish a grant program for brownfield cleanup); *Superfund: Negotiations Lag in Senate Committee; Industry Gives Mixed Reports on Progress*, Nat'l Env't Daily (BNA), at D-4 (Oct. 17, 1997), *available in* WESTLAW, BNA-NED database (noting that brownfields provisions may be included in Senate Superfund reform legislation).

50. *See* Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 941, 111 Stat. 788, 882-84 (codified at 26 U.S.C.A. § 198(a)-(h) (West 1997)). The change provided in the bill allows current-year deductions of certain brownfields expenditures rather than requiring capitalization and recovery of the expenditures by a taxpayer over the life of the project. A previous Internal Revenue Service ruling allowed certain costs of cleanup of contaminated properties to be deducted in the same year that they were incurred. *See* Rev. Rul. 94-38, 1994-1 C.B. 35. The ruling, however, applied to only owners of contaminated property, not prospective purchasers, and was unclear whether the current year deduction applied to only the type of cleanup costs discussed in the ruling. *See* U.S. EPA, EPA 500-F-197-155, BROWNFIELDS TAX INCENTIVE 1 (1997). According to the EPA, the ruling

> created potential financial obstacles in the contaminated properties market. Specifically, owners of contaminated property could remediate their property and sell the clean property at its full market value, enabling them to fully recover the cost of remediation. However, prospective purchasers of contaminated property had to purchase the property at its impaired value, attributable to the contamination, and capitalize the remediation costs. This arguably left prospective purchasers at a disadvantage in terms of environmental remediation expenditures. Additionally, property owners who wanted to remediate their property and put it to a different use were at a disadvantage because they were not able to fully deduct their remediation costs in the year incurred.

Id. The brownfield tax incentive was designed to overcome these confusing problems. *See id.*

"Initiative").[51] According to the EPA, the Initiative is "designed to empower States, cities, Tribes, communities, and other stakeholders in economic redevelopment to work together in a timely manner to prevent, assess, safely clean up, and sustainably reuse brownfields."[52] The Initiative consists of four general categories of actions: (1) brownfields demonstration pilot programs, through which the EPA selects certain communities to participate in agreements that provide up to $200,000 in funding for pilot programs addressing brownfields redevelopment;[53] (2) establishment of a federal interagency working group to develop a national strategy for brownfields redevelopment; (3) development of job-training programs relating to brownfields redevelopment;[54] and (4) clarification of liability issues relating to brownfields.[55] This fourth category includes action by the EPA to remove or "archive" about 30,000 contaminated sites nationwide that were listed on the agency's Comprehensive Environmental Response, Compensation and Liability Information System ("CERCLIS") as potential Superfund sites.[56] The goal of the archival

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51. *See* U.S. EPA, EPA 500-F-97-092, BROWNFIELDS ECONOMIC REDEVELOPMENT INITIATIVE 1 (1997) [hereinafter BROWNFIELDS ECONOMIC REDEVELOPMENT INITIATIVE]; *see also* U.S. EPA, *The Brownfields Action Agenda* (last updated Sept. 30, 1997) <http://www.epa.gov/swerosps/bf/ascii/action.txt> (explaining the brownfields initiative and listing EPA accomplishments).

52. BROWNFIELDS ECONOMIC REDEVELOPMENT INITIATIVE, *supra* note 51, at 1.

53. In addition to the Charlotte pilot program mentioned above, *see supra* note 2, the EPA has selected the North Carolina cities of Fayetteville and High Point to participate in the brownfields pilot programs. *See* U.S. EPA, EPA 500-F-97-128, NATIONAL BROWNFIELDS ASSESSMENT PILOT: FAYETTEVILLE, NC 1-2 (1997); U.S. EPA, EPA 500-F-97-131, NATIONAL BROWNFIELDS ASSESSMENT PILOT: HIGH POINT, NC 1-2 (1997). The EPA selects pilot programs following submission of proposals from communities seeking funding assistance for brownfields redevelopment. The programs are chosen based on whether a proposal meets certain EPA-designated criteria, including the effect of brownfields on the community, levels of existing community commitment to brownfields redevelopment, the development of an environmental justice plan for the proposal, and national replicability of the proposal's efforts. *See* U.S. EPA, EPA 500-F-97-156, THE BROWNFIELDS ECONOMIC REDEVELOPMENT INITIATIVE: PROPOSAL GUIDELINES FOR BROWNFIELDS ASSESSMENT DEMONSTRATION PILOTS 6, 10-14 (1997).

54. The EPA reportedly has initiated these efforts to "foster workforce development in brownfields communities through environmental education, recruitment of students from disadvantaged communities, and quality worker training." BROWNFIELDS ECONOMIC REDEVELOPMENT INITIATIVE, *supra* note 51, at 2; *see also* U.S. EPA, EPA 500-F-97-158, BROWNFIELDS—WORKFORCE DEVELOPMENT 1 (1997) (describing the agency's job-training efforts relating to brownfields).

55. *See* BROWNFIELDS ECONOMIC REDEVELOPMENT INITIATIVE, *supra* note 51, at 1.

56. *See* U.S. EPA, EPA 500-F-97-089, ARCHIVAL OF CERCLIS SITES 1 (1997). The EPA has recognized the potential problem of CERCLA listing for brownfields sites, noting that

> [a]ll sites reported to EPA as potential Superfund candidates are entered into

process is to remove sites from CERCLIS that are not actually contaminated or have minimal levels of contamination so that developers and lenders are more willing to deal with the sites without the stigma of a CERCLIS hazardous site label.[57] Liability clarification also includes the issuance of several directives and guidance by the EPA that limit the liability of property owners for groundwater contamination caused by a neighboring property,[58] increase the consideration of future land uses in deciding which remedies to apply to National Priority List site cleanup,[59] and state the conditions under which the EPA will not sue prospective purchasers of already-contaminated property.[60]

Finally, the EPA has entered into memoranda of agreement with eleven states to clarify their respective roles at sites being addressed under state voluntary cleanup programs and to provide for "division of labor" at contaminated sites between the EPA and the states.[61] The EPA also has developed a guidance document intended to address possible developer uncertainty arising from the overlap of federal and state cleanup authorities.[62] The guidance document

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> CERCLIS. Historically, EPA maintained information about these sites in the CERCLIS inventory regardless of their status, including sites where it was determined that no further Federal Superfund interest was warranted. This practice led to unintended barriers to the redevelopment of these properties specifically because sites listed in CERCLIS are often automatically considered risky by the lending industry, making it difficult for potential purchasers to secure loans to develop these properties. As a result, potential developers may shy away from these properties simply because they are in [sic] listed in CERCLIS.

Id.

57. *See id.*

58. *See* Announcement and Publication of Final Policy Toward Owners of Property Containing Contaminated Aquifers, 60 Fed. Reg. 34,790, at 34,790-92 (1995).

59. *See* OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, U.S. EPA, OFFICE OF SOLID WASTE & EMERGENCY RESPONSE DIRECTIVE NO. 9355.7-04, LAND USE IN THE CERCLA REMEDY SELECTION PROCESS 4 (1995).

60. *See* Announcement and Publication of Guidance on Agreements with Prospective Purchasers of Contaminated Property and Model Prospective Purchaser Agreement, 60 Fed. Reg. 34,792, at 34,792-95 (1995).

61. OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, U.S. EPA, MEMORANDUM: INTERIM APPROACHES FOR REGIONAL RELATIONS WITH STATE VOLUNTARY CLEANUP PROGRAMS 1 (1996); *see also* Notice of Availability of Final Draft Guidance for Developing Superfund Memoranda of Agreement (MOA) Language Concerning State Voluntary Cleanup Programs, 62 Fed. Reg. 47,495, 47,496 (1997) [hereinafter MOA Guidance] (noting that 11 memoranda of agreement had been signed by states and EPA regions); U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-97-66, SUPERFUND: STATE VOLUNTARY PROGRAMS PROVIDE INCENTIVES TO ENCOURAGE CLEANUPS 48-49 (1997) (listing 10 states that, as of 1995, had entered into memoranda of agreement).

62. *See* MOA Guidance, *supra* note 61, at 47,496-506.

suggests the use of site designation or screening processes to identify low-risk sites that can be included in memoranda of agreement between the EPA and the states regarding state voluntary cleanup programs, or to identify high-risk sites that cannot be included in such memoranda of agreement.[63]

Federal efforts, particularly the lender liability protections enacted in 1996, may encourage the redevelopment of brownfields. However, state governments, faced with pressure from public and private interests to find ways to redevelop or reuse abandoned industrial sites, have initiated a number of reforms to their laws governing the cleanup of contaminated sites that may have a greater initial effect than federal actions.[64] At least thirty states have established some version of voluntary cleanup or brownfield redevelopment programs to encourage reuse of certain contaminated sites.[65] State voluntary cleanup or brownfields programs vary widely

63. *See id.* The guidance document will be used by the EPA to evaluate state voluntary cleanup programs before entering MOA. *See id.* at 47,497. The guidance document has upset state environmental regulatory agencies, which have requested that the EPA rescind it because of concerns about the possible intrusion into state voluntary program activities. *See States: Withdraw Intrusive Brownfields Guidance, State Officials Tell EPA*, Daily Env't Rep. (BNA) No. 186, at A6 (Sept. 25, 1997), *available in* WESTLAW, BNA-ENV database.

64. *See* Anderson, *supra* note 41, at 26 (noting that states "generally have a better understanding of contaminated sites and communities affected by them" than the federal government does); Goff-Sanders, *supra* note 28, at 150 (commenting that despite a federal willingness to address brownfields, states tend to be the forerunners in this area).

65. *See, e.g.*, COLO. REV. STAT. §§ 25-16-301 to -311 (1997) (creating the state's Voluntary Clean-up and Redevelopment Act); CONN. GEN. STAT. ANN. § 22a-133m (West 1995) (creating the state's Urban Sites Remedial Action Program); FLA. STAT. ANN. §§ 376.77 to .83 (West Supp. 1998) (creating the state's Brownfields Redevelopment Act); MD. CODE ANN., ENVIR. §§ 7-501 to -516 (Supp. 1997) (creating the state's voluntary cleanup program); MO. ANN. STAT. §§ 260.565-.575 (West Supp. 1998) (creating voluntary remediation program); N.C. GEN. STAT. § 130A-310.10 (1996) (creating a voluntary remediation program); OHIO REV. CODE ANN. §§ 3746.01-.99 (Anderson 1997) (creating the state's Voluntary Action Program); PA. STAT. ANN. tit. 35, §§ 6026.101-.908 (West Supp. 1997) (creating the state's Land Recycling and Environmental Remediation Standards Act); R.I. GEN. LAWS §§ 23-19.14-1 to -19 (1996) (creating the state's Industrial Property Remediation and Reuse Act); TENN. CODE ANN. § 68-212-224 (1996) (creating voluntary cleanup oversight and assistance program); TEX. HEALTH & SAFETY CODE ANN. §§ 361.601-.613 (West Supp. 1997) (creating a voluntary cleanup program); VT. STAT. ANN. tit. 10, § 6615a (1997) (creating program for redevelopment of contaminated properties); VA. CODE ANN. §§ 10.1-1429.1 to .4 (Michie Supp. 1997) (creating state voluntary remediation program and Remediated Properties Fresh Start Program); W. VA. CODE §§ 22-22-1 to -21 (Supp. 1997) (creating the Voluntary Remediation and Redevelopment Act).

As indicated previously, commentators tend to use the terms "brownfields" and "voluntary cleanup" interchangeably in describing state programs. *See supra* note 16. Similarly, the number of state brownfield and voluntary cleanup programs identified by commentators varies. For example, the Environmental Law Institute noted in 1995 that

in terms of the specific elements of the programs, the level of state involvement in the actual cleanup of sites, the required standards for cleanup of contaminated sites, the liability protection provided and to whom that protection applies, and state funding assistance for remediation.[66] In general, however, the goals of the programs are to persuade current owners or prospective purchasers of property to remediate contamination and to persuade lenders to provide money to allow these parties to buy or redevelop the property.[67] The programs use a variety of incentives to accomplish these goals, but most generally offer the use of voluntary remediation agreements with the state, site-specific remediation standards tied to the intended use of the property, and project-completion documentation providing future liability protection.[68]

Regardless of their differences, state voluntary cleanup or brownfields initiatives primarily resulted from a combination of pressures to develop measures to reduce the problems caused by abandoned industrial sites[69] and a concurrent recognition that these sites often have attributes that, without the uncertainty caused by

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31 states had established voluntary cleanup programs. *See* ENVIRONMENTAL L. INST., AN ANALYSIS OF STATE SUPERFUND PROGRAMS: 50-STATE STUDY, 1995 UPDATE 51 (1995). The same study commented that "15 [s]tates had established formal brownfields programs and eight others were in the process of developing some sort of program" by the end of 1995. *Id.* at 54. Another commentator identified 22 state voluntary cleanup programs in early 1996. *See* Elizabeth Glass Geltman, *Recycling Land: Encouraging the Redevelopment of Contaminated Property*, NAT. RESOURCES & ENV'T, Spring 1996, at 3, 8 [hereinafter Geltman, *Recycling Land*].

For detailed discussions of the various elements of the state programs enacted to encourage voluntary cleanup of contaminated sites or brownfields, see the following: U.S. GEN. ACCOUNTING OFFICE, *supra* note 61, at 18-45 (summarizing the provisions of 17 state voluntary cleanup programs); BARTSCH & COLLATON, *supra* note 29, at 76-90 (discussing state and local tools to promote brownfield project finance); BROWNFIELDS: A COMPREHENSIVE GUIDE TO REDEVELOPING CONTAMINATED PROPERTY, *supra* note 33, at 287-681 (reviewing programs of 30 different states); ELIZABETH GLASS GELTMAN, A COMPLETE GUIDE TO ENVIRONMENTAL AUDITS 437-95 (1997) (discussing voluntary cleanup programs); ENVIRONMENTAL L. INST., *supra*, at 51-55, 123-42 (same); Anderson, *supra* note 41, at 23-26 (discussing voluntary cleanup programs adopted by several states); Andrew, *supra* note 16, at 28-30 (focusing on midwestern state programs); Eisen, *supra* note 26, at 914-79, 1033-39 (discussing voluntary cleanup programs adopted by several states); Geltman, *Recycling Land*, *supra*, at 8-10 (identifying various state brownfield and voluntary clean-up programs); Goff-Sanders, *supra* note 28, at 153-64 (focusing on programs in Florida, Georgia, and Kentucky).

66. *See, e.g.*, ENVIRONMENTAL L. INST., *supra* note 65, at 51-55 (noting the varying requirements of individual state brownfield and voluntary cleanup programs).

67. *See* Weintraub & Gruza, *supra* note 21, at 58.

68. *See id.*

69. *See supra* notes 24-29 and accompanying text (discussing the problems created by brownfields).

contamination, would make them attractive to development and business interests.[70] Brownfields often occur in areas that satisfy a number of criteria businesses use in choosing a location, including "ready access to markets for labor and materials, access to domestic and international transportation facilities, reduced site preparation costs, and favorable land value tax treatment."[71] These features make brownfields potentially attractive to business and industry if problems relating to the contamination of the sites can be overcome.

In 1996, business and industry organizations in North Carolina, having identified a growing concern in the state regarding the problems of transferring, financing, or redeveloping brownfields sites,[72] began discussing proposals to create a specific brownfields redevelopment act. The state already had developed a voluntary cleanup program as the result of legislation enacted in 1987 that limits the costs of implementing remediation to a maximum of $3 million for responsible parties agreeing to clean up a site voluntarily and that allows the voluntary remediation of a site to be implemented and overseen by private, certified environmental professionals.[73] Although this program is voluntary and does provide a means for responsible parties to limit their costs of cleanup, the

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70. *See* Sweeney, *supra* note 25, at 109.

71. *Id.* Michael Sweeney identifies in detail how these considerations may come into play if a company is presented with the option of locating at a brownfields site:

> Many Brownfields have immediate access to markets for labor and materials, as well as access to transportation facilities .... Although suburban locations may have better access to freeways that serve the domestic marketplace, central-city locations have immediate access to ... transportation [systems] that permit industrial facilities to serve both domestic and international marketplaces at once.
>
> In addition, site preparation costs of a Brownfields redevelopment project are significantly lower than costs associated with developing virgin land and resources. Specifically, the cost of installing roadways, water lines, sewers, and electricity is de minimus [sic] when compared to the costs of constructing the same infrastructure at an undeveloped "Greenfields" site.
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> ... Locating an industrial or manufacturing site near existing operations also provides ready access to trained workers. In addition, zoning and land-use restrictions pertinent to Brownfields normally reflect the facility's former use. In most instances, Brownfields are zoned for industrial or commercial uses.

Id. at 108-09.

72. *See* Case & Anderson, *supra* note 20, at 2; *see also* Wade Rawlins, *'Recycling' of Sites Gets House OK*, NEWS & OBSERVER (Raleigh, N.C.), June 18, 1997, at A3 (providing business community rationale for development of the bill and comments by industry officials); Steve Tuttle, *General Assembly to Debate Brownfield Legislation*, NORTH CAROLINA, Feb. 1997, at 22, 22-23 (describing problems encountered by businesses that prompted legislation in the state).

73. *See* N.C. GEN. STAT. § 130A-310.9 (1997) (establishing provisions for voluntary remediation program).

program does not allow for variation from statewide cleanup standards.[74] Such variation would allow remediation to levels that may be more appropriate for specific proposed brownfields uses.[75] These shortcomings have been identified as limiting the usefulness of the voluntary cleanup program for brownfields sites.[76] One participant in the development of the Act noted that brownfields legislation would help ensure that the state "remain[ed] in step" with emerging federal brownfields initiatives and that redevelopment programs similar to the Charlotte brownfields development program would be encouraged.[77]

North Carolina Citizens for Business and Industry ("NCCBI") spearheaded the early industry discussions regarding the legislation.[78] As the discussions progressed, however, other stakeholders in this type of legislation, including environmental organizations and the state Department of Environment and Natural Resources ("DENR"),[79] became involved in negotiations on the proposal.[80] Although these entities "share[d] an interest in getting ... industrial sites cleaned up and put back into productive use,"[81] they were concerned with several provisions of the initial proposal. For example, they questioned whether the definition of "brownfields" in the proposed legislation should be limited to ensure that the "relaxed provisions" of the legislation could not be claimed "by the owner of ... any contaminated property looking to avoid responsibility."[82] Environmental groups and DENR were troubled by the fact that extensive limits on liability for remediation costs might allow parties responsible for actual contamination of sites to attempt to take

74. *See* Case & Anderson, *supra* note 20, at 4.

75. *See infra* notes 157-62 and accompanying text (describing the use of site-specific standards for brownfields).

76. *See* Case & Anderson, *supra* note 20, at 4.

77. *See* Tuttle, *supra* note 72, at 23.

78. *See id.* at 22; Telephone Interview with William Holman, North Carolina Chapter, The Nature Conservancy (Sept. 19, 1997) [hereinafter Holman Interview]; Whisnant Interview, *supra* note 11.

79. *See supra* note 11 (discussing the name change of this department).

80. *See* Case & Anderson, *supra* note 20, at 3; Whisnant Interview, *supra* note 11.

81. Tuttle, *supra* note 72, at 23; *see also* Batten, *supra* note 4, at M22 (noting environmentalist approval of legislation for reusing abandoned inner-city sites to preserve undeveloped land). Environmental group representatives involved in development of the legislation, although concerned whether residents near brownfields would be fully apprised of a redevelopment initiative, reportedly felt that the bill was an acceptable trade-off because it provided a means of increasing the cleanup of contaminated properties. *See* Bruce Henderson, *Cleanup Limit Asked for Industrial Sites*, CHARLOTTE OBSERVER, May 27, 1997, at C1.

82. Tuttle, *supra* note 72, at 23-24.

advantage of the brownfields legislation's protections.[83] The discussions held among these various interests resulted in a compromise providing limited liability from state action for remediation to "prospective developers" of sites.[84] This term includes persons who want to buy or sell brownfields properties for redevelopment, but does not include persons responsible for contaminating the site.[85]

In April 1997, after months of negotiations and discussions, Representative Daniel McComas of Wilmington filed House Bill 1121, which created the Brownfields Property Reuse Act of 1997.[86] The bill was introduced in the House on April 21, 1997,[87] and had its first hearing in the House Committee on Environment on May 14, 1997.[88] At that meeting, Representative McComas stated the basic rationale behind the Act, commenting that "these sites typically provide no positives for the areas in which they are located, and that by recycling them you bring them into productive use."[89] The bill was reported from the Committee as a committee substitute.[90] The bill was passed by both the House and the Senate and enacted on August 1, 1997.[91]

As enacted, the Act establishes the findings of the North

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83. *See id.* at 24; Holman Interview, *supra* note 78; Whisnant Interview, *supra* note 11.

84. *See* Case & Anderson, *supra* note 20, at 4; Whisnant Interview, *supra* note 11.

85. *See* N.C. GEN. STAT. § 130A-310.31(b)(10) (1997).

86. Brownfields Property Reuse Act of 1997, ch. 357, 1997 N.C. Adv. Legis. Serv. 244 (codified as amended at N.C. GEN. STAT. §§ 130A-310.30 to .40 (1997)).

87. *See* 47 Daily Bull.: Actions by the N.C. Gen. Assembly (Legis. Reporting Serv., N.C. Inst. Gov't) at 4, 48-49 (Apr. 21, 1997).

88. *See* NORTH CAROLINA HOUSE COMM. ON ENV'T, MINUTES: MAY 14, 1997, at 1-2.

89. *Id.* at 1.

90. *See id.* at 2. The committee substitute made a number of clarifying and technical changes to the original bill. *See* Committee Substitute for House Bill 1121, May 14, 1997. The substitute also deleted provisions that imposed felony penalties for certain violations of the Act, deleted appropriations to DENR for implementation of the Act, and created a revolving trust fund for deposit of monies for implementing the Act. *See* NORTH CAROLINA GEN. ASSEMBLY, FISCAL RESEARCH DIV., LEGISLATIVE FISCAL NOTE, June 2, 1997, at 2.

91. The bill was reported favorably from the House Committee on Finance on June 11, 1997, *see* NORTH CAROLINA HOUSE COMM. ON FIN., MINUTES: JUNE 10, 1997, at 4, and was passed by the House on June 18, 1997, *see* 81 Daily Bull.: Actions by the N.C. Gen. Assembly (Legis. Reporting Serv., N.C. Inst. Gov't) at 2 (June 18, 1997). After receiving consideration by two Senate committees, the bill passed the Senate on July 23, 1997. *See* 101 Daily Bull.: Actions by the N.C. Gen. Assembly (Legis. Reporting Serv., N.C. Inst. Gov't) at 2 (July 23, 1997). The House ratified the bill on July 24, 1997, and the bill was enacted into law on August 1, 1997. *See* 107 Daily Bull.: Actions by the N.C. Gen. Assembly (Legis. Reporting Serv., N.C. Inst. Gov't) at 2 (Aug. 4, 1997).

Carolina General Assembly that brownfields are attractive for redevelopment,[92] the use of brownfields is restricted by the threat of liability for contamination,[93] redeveloping brownfields will benefit the state through improved local tax bases and new employment,[94] and the public should be involved in brownfield redevelopment projects.[95] The Act defines "brownfields property" or "brownfields site" as "abandoned, idled, or underused property at which expansion or redevelopment is hindered by actual environmental contamination or the possibility of contamination and that is subject to remediation under [state or federal cleanup laws]."[96] One of the important findings of the General Assembly was that "[p]otential purchasers and developers of brownfields . . . , including redevelopment lenders, should be encouraged to provide capital and labor to improve brownfields without undue risk of liability for problems they did not create, so long as the property can be . . . made safe for appropriate future use."[97]

The heart of the Act is the agreement developed by a prospective developer[98] and DENR to conduct remediation of the brownfields property to the levels established in the agreement.[99] The Act establishes a procedure whereby DENR may enter into a "brownfields agreement" with a prospective developer that includes information from the prospective developer, or the parent, subsidiary, or affiliate of the prospective developer, provided that: (1) the prospective developer has complied with other brownfields agreements into which it has entered; (2) the property will be remediated to standards suitable for the uses prescribed in the agreement rather than current cleanup standards;[100] (3) there is a

92. *See* Brownfields Property Reuse Act of 1997, ch. 357, § 1(1), 1997 N.C. Adv. Legis. Serv. 244, 244.

93. *See id.* § 1(2), 1997 N.C. Adv. Legis. Serv. at 244.

94. *See id.* § 1(3), 1997 N.C. Adv. Legis. Serv. at 244.

95. *See id.* § 1(5), 1997 N.C. Adv. Legis. Serv. at 244.

96. N.C. GEN. STAT. § 130A-310.31(b)(3) (1997).

97. Brownfields Property Reuse Act of 1997, ch. 357, § 1(4), 1997 N.C. Adv. Legis. Serv. 244, 244.

98. *See* N.C. GEN. STAT. § 130A-310.31(b)(10) (1997). As mentioned above, the definition of "prospective developer" is restricted to a purchaser or a later-acquiring party and does not allow the party responsible for the contamination to take advantage of the provisions of the Act. *See supra* note 85 and accompanying text. The responsible party would still have to complete remediation of the site pursuant to other state or federal hazardous site cleanup requirements. *See* N.C. GEN. STAT. § 130A-310.31(b)(10) (1997).

99. *See* N.C. GEN. STAT. § 130A-310.32 (1997).

100. The phrase "current standards," as used in the Act, "means generally applicable standards, guidance, or established methods" for contaminants established by statute or

public benefit commensurate with any liability protection provided to the prospective developer under the Act; and (4) the prospective developer will have the financial, managerial, and technical resources to complete the requirements of the agreement.[101] The Act also allows the incorporation of land-use restrictions in the agreement so that remediation activities will take into account the restrictions.[102] Finally, in addition to a description of the site, applicable remediation standards, and the methods for remediation, the Act provides that the agreement may contain a statement of the desired results of the project, the guidelines for accomplishing these results, and the potential consequences for failure to achieve the desired results.[103] A decision by DENR not to enter into a brownfields agreement, including any terms of the agreement, is subject to review under the contested case provisions of the North Carolina Administrative Procedures Act.[104]

The Brownfields Property Reuse Act of 1997 provides that a prospective developer who enters into a brownfields agreement with DENR and who complies with the terms of the agreement will not be held liable for remediation of contaminants identified in the agreement.[105] This liability protection applies as long as the brownfield redevelopment activities under the control or direction of

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regulation, instead of certain risk-based standards established by the state Environmental Management Commission. *See id.* § 130A-310.31(b)(5). Although the definition states that the term "current standards" does not include risk-based standards established "pursuant to this Part," *see id.*, the part of the statutes created by the Act does not mention risk-based standards, *see id.* §§ 130A-310.30 to .40. The definition of "current standards" was included in amendments to the Dry-Cleaning Solvent Cleanup Act of 1997, ch. 392, 1997 N.C. Adv. Legis. Serv. 6, which does authorize DENR to adopt a risk-based approach for remediation under that Act. *See* N.C. GEN. STAT. § 143-215.104D(b)(3) (Supp. 1997) (authorizing DENR to adopt risk-based approaches under the Dry-Cleaning Solvent Cleanup Act). It is possible that the drafters of the brownfields statute intended the exclusion of risk-based standards to apply to any risk-based standards developed by DENR or the Environmental Management Commission, which would limit the use of such standards under the Act where the term "current standards" is used. For example, the Act requires a brownfields agreement to show that remediation will be suitable for proposed land uses rather than being "remediated to current standards." N.C. GEN. STAT. § 130A-310.32(a)(3) (1997). This implies that the remediation would not include risk-based standards, or at least those risk-based standards developed pursuant to the Dry-Cleaning Solvent Cleanup Act. *See id.* § 130A-310.31(b)(5).

101. *See* N.C. GEN. STAT. § 130A-310.32(a)(1)-(5) (1997).

102. *See id.* § 130A-310.32(b).

103. *See id.* § 130A-310.32(c)(1)-(5).

104. *See id.* § 130A-310.36; *see also* N.C. GEN. STAT. §§ 150B-22 to -37 (1995) (establishing procedures and requirements for administrative hearings).

105. *See* N.C. GEN. STAT. § 130A-310.33(a) (1997).

the developer do not increase environmental or public health risks, and as long as no additional remediation is required of the developer.[106] The Act is not intended to relieve any person receiving liability protection under the Act from liability for later contamination the person may cause on the brownfields property.[107]

Liability protection is provided not only to the prospective developer, but also to agents of the prospective developer involved in cleanup of the site, future owners of the site, persons who develop or occupy the site, successors and assigns of persons subject to the liability protection, and lenders or fiduciaries providing financing for remediation or redevelopment.[108] The Act also provides that a person conducting environmental assessments or transaction screenings on brownfields properties is not considered to be a potentially responsible party liable for cleanup unless the person increases the risk to public health or the environment as a result of the assessment or screening.[109] The Act is not intended to affect the right of any person to seek relief or contribution from any party to a brownfields agreement who may be liable for the brownfields property.[110] It also is not intended to affect the right of any person liable for brownfields property to seek contribution from any person who also may be liable for acts relating to the property and who has not received liability protection under the Act.[111]

DENR may require additional remediation of a site beyond what is contained in a brownfields agreement if: (1) the prospective developer knowingly or recklessly provides false information in forming the brownfields agreement or in demonstrating compliance with the agreement;[112] (2) new information is discovered showing previously unreported contaminants on a site or unreported contamination of an area of a site that has not been cleaned up to current standards;[113] (3) exposure conditions at the site change such

106. *See id.*

107. *See id.* § 130A-310.37(a)(4).

108. *See id.* § 130A-310.33(a)(1)-(5).

109. *See id.* § 130A-310.33(b). Environmental site assessments and "transaction screens" are part of the due diligence investigations conducted by property owners and lenders to determine whether environmental risks and potential CERCLA liability may exist. *See* ENVIRONMENTAL ASPECTS OF REAL ESTATE TRANSACTIONS 180-86 (James B. Witkin ed., 1995). The "transaction screen" process generally includes "a questionaire to be completed by the owner of the site or its operator . . . ; a site visit; and a records review." *Id.* at 183.

110. *See* N.C. GEN. STAT. § 130A-310.37(5) (1997).

111. *See id.* § 130A-310.37(6).

112. *See id.* § 130A-310.33(c)(1).

113. *See id.* § 130A-310.33(c)(2). This situation requires further remediation only if

that they may lead to unacceptable levels of risk at or in the vicinity of the site;[114] (4) DENR discovers new information about contaminants that increase environmental or public health risks beyond an acceptable range and that are different than what is anticipated in the brownfields agreement;[115] or (5) the prospective developer fails to file a Notice of Brownfields Development as required by the Act.[116]

Generally, a prospective developer wanting to enter a brownfields agreement with the state must inform the public of the brownfields remediation and redevelopment plans.[117] The first step in this process is for the prospective developer to submit a Notice of Intent to Redevelop a Brownfields Property to DENR.[118] This notice must contain the following: (1) a legal description of the location of the property; (2) a map of its location; (3) a description of the contaminants involved and their concentrations; (4) a description of the proposed use of the property; (5) proposed remediation and investigation efforts; (6) a proposed Notice of Brownfields Property which will be recorded eventually as part of the deed for the brownfields property; and (7) the time period for submitting comments or requesting a public hearing on the brownfields agreement.[119] Following approval of the Notice of Intent by DENR, the prospective developer must: (1) provide copies of the notice to

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the brownfields agreement sets maximum concentration levels for contaminants and the newly discovered contaminants raise the levels of public health or environmental risk to levels greater than what is allowed under the brownfields agreement. *See id.*

114. *See id.* § 130A-310.33(c)(3). Changes in exposure conditions at a site include changes in land use that increase the probability of exposure to contaminants, or the failure of the remediation efforts to meet the levels of risk embodied in the brownfields agreement. *See id.*

115. *See id.* § 130A-310.33(c)(4). If a person uses or changes the use of the brownfields property such that environmental or public health risks are increased, DENR may require that person to perform additional remediation. *See id.*

116. *See id.* § 130A-310.33(5); *see also infra* notes 127-31 and accompanying text (describing the Notice of Brownfields Property requirement). The term "Notice of Brownfields Development" appears to be a scrivener's error that should read "Notice of Brownfields Property" or "Notice of Intent to Redevelop a Brownfields Property," which are the phrases used in other sections of the Act to describe notice requirements. *See, e.g.*, N.C. GEN. STAT. § 130A-310.34(a) (1997) (requiring a prospective developer to submit to DENR a Notice of Intent to Redevelop a Brownfields Property as part of the public notice provisions of the Act); *id.* § 130A-310.35(a) (requiring a prospective developer to submit to DENR a Notice of Brownfields Property if the developer wants to enter into a brownfields agreement).

117. *See* N.C. GEN. STAT. § 130A-310.34 (1997).

118. *See id.* § 130A-310.34(a).

119. *See id.*; *see also infra* notes 127-37 and accompanying text (describing the elements of a Notice of Brownfields Property and its recording).

local governments having jurisdiction over the property; (2) publish the notice in certain newspapers in the area where the property is located; (3) submit a summary of the notice to the state for publication in the North Carolina Register; and (4) post a copy of the notice at the brownfields site.[120] A sixty-day public comment period on the brownfields agreement begins upon publication of the notice in the North Carolina Register and the required newspaper.[121] In addition, DENR must hold a public meeting on the brownfields agreement if it receives requests for a meeting and considers it to be in the public interest to hold one.[122] The prospective developer is required to publish notice of a public meeting, if one will be held, in newspapers of general circulation within the county in which the brownfields property is located.[123]

As part of the Notice of Intent to Redevelop a Brownfields Property, a prospective developer must submit a Notice of Brownfields Property to DENR.[124] A Notice of Brownfields Property must include not only a professionally certified survey plat of areas designated by DENR relating to the property, but also a legal description sufficient to describe the property in an instrument of conveyance.[125] The notice must include information on the location and dimensions of the areas of potential environmental concern; the type, location, and quantity of contaminants existing on the property; and any restrictions on current or future use of the brownfields property.[126]

The Act requires that the Notice of Brownfields Property, after approval and certification by DENR, be filed by the prospective developer with the register of deeds of the county in which the property is located.[127] The register of deeds must then record the

120. *See* N.C. GEN. STAT. § 130.310.34(a) (1997).
121. *See id.* § 130A-310.34(b).
122. *See id.* § 130A-310.34(c).
123. *See id.*
124. *See id.* § 130A-310.35(a)-(g).
125. *See id.* § 130A-310.35(a). The importance of a legal description that is the same as the kind used in an instrument of conveyance is that the Notice of Brownfields Property also must be filed with the appropriate county register of deeds and will accompany the deed to the property in any subsequent transfer. *See id.* § 130A-310.35(b).
126. *See id.* § 130A-310.35(a)(1)-(3). The description of restrictions on property also may include restrictions on "other property that are necessary or useful to maintain the level of protection appropriate for the designated current or future use of the brownfields property and that are designated in the brownfields agreement." *Id.* § 130A-310.35(a)(3). The types of land-use restrictions may include, but are not limited to, restrictions on groundwater use, building, filling, grading, excavating, and mining. *See id.*
127. *See id.* § 130A-310.35(b).

notice and index it in the grantor index under the names of the property owners and, if different, the names of the prospective developers of the property.[128] If a brownfields property is later sold, leased, or otherwise transferred or conveyed, the deed or instrument of transfer must note in the description section that the property has been classified as a brownfields property and, if appropriate, has been cleaned up as a brownfields property.[129] The Act also provides that the Secretary of DENR may cancel the notice filed with a register of deeds, upon request of the property owner, if hazards on the property have been eliminated.[130] If this cancellation occurs, the Secretary is required to send a statement to this effect to the register of deeds, who then will record the statement and, if practicable, note on the Notice of Brownfields Property that a cancellation statement has been recorded.[131]

Land-use restrictions that are filed as part of the Notice of Brownfields Property may be enforced by the owner of the property, by DENR through its general statutory enforcement remedies or through a civil action, by local governments with jurisdiction over the property, or by a person subject to liability protection under the Act, who will lose the liability protection if the land-use restriction is violated.[132] DENR or the local government with jurisdiction may initiate enforcement actions without having first exhausted available administrative remedies.[133] Significantly, a land-use restriction included in a Notice of Brownfields Property cannot "be declared unenforceable due to lack of privity of estate or contract, due to lack of benefit to particular land, or due to lack of any property interest in particular land."[134] Allowing the enforcement of land-use restrictions as part of a brownfields agreement is a departure from the requirements that have been imposed by the state's courts on the enforceability of similar restrictions. Under North Carolina common law, restrictions of this nature on the future use of property are unenforceable except in certain limited circumstances.[135] The

128. *See id.* § 130A-310.35(c).
129. *See id.* § 130A-310.35(d).
130. *See id.* § 130A-310.35(e).
131. *See id.*
132. *See id.* § 130A-310.35(f); *see also id.* §§ 130A-17 to -28 (describing DENR's general statutory enforcement authority).
133. *See id.* § 130A-310.35(f).
134. *Id.*
135. *See* Case & Anderson, *supra* note 20, at 3; *see also, e.g.*, Rosi v. McCoy, 319 N.C. 589, 592, 356 S.E.2d 568, 570 (1987) ("[R]estrictive covenants . . . in derogation of the free and unfettered use of land . . . are to be strictly construed in favor of the unrestricted use

drafters of the Act were concerned that even if land-use restrictions were imposed as part of a brownfields agreement, "a brownfield property might be cleaned up to a level that was safe or appropriate for the current uses of the property, but that the future development spawned from those redevelopment efforts might ultimately prove to be inconsistent with the level of cleanup originally approved."[136] Thus, the provisions allowing enforcement of land-use restrictions were included in the bill to ensure that brownfields land-use restrictions would continue.[137]

The construction of the Act is subject to certain limitations and provisions. The Act is not intended to affect local government regulation of land uses under state law.[138] It does not change or repeal any provision of a remedial program or other program established under other public health or pollution control statutes.[139] The Act is not intended to impede DENR's ability to respond immediately to releases of regulated substances[140] that could threaten

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of property." (citing Shuford v. Asheville Oil Co., 243 N.C. 636, 647, 91 S.E.2d 903, 912 (1956))).

136. Case & Anderson, *supra* note 20, at 3.

137. Prior to the introduction of House Bill 1121, the Environmental Review Commission, at the request of DENR, recommended to the General Assembly that legislation be introduced to allow the Secretary of DENR to approve and enforce the imposition of land-use and other restrictions on inactive hazardous substance or waste disposal sites. *See* NORTH CAROLINA ENVTL. REVIEW COMM'N, ENVIRONMENTAL REVIEW MEETING 17 (Feb. 15, 1996) (providing a summary of comments of DENR staff regarding the recommendation); NORTH CAROLINA ENVTL. REVIEW COMM'N, ENVIRONMENTAL REVIEW MEETING 6 (Feb. 5, 1997) (noting the Commission's adoption of recommended legislation). A bill embodying this provision, Senate Bill 125, was introduced on February 17, 1997. *See* 11 Daily Bull.: Actions by the N.C. Gen. Assembly (Legis. Reporting Serv., N.C. Inst. Gov't), at 6 (Feb. 17, 1997). Senate Bill 125 was amended later in the session and was enacted on August 14, 1997. *See* 115 Daily Bull.: Actions by the N.C. Gen. Assembly (Legis. Reporting Serv., N.C. Inst. Gov't), at 6 (Aug. 18, 1997). As enacted, Senate Bill 125 not only provides the Secretary with the powers granted in the original bill, but also allows use restrictions to be applied to sites contaminated by a discharge or release of oil or a hazardous substance, allows restrictions on groundwater use, clarifies DENR's enforcement authority, provides that restrictions are not unenforceable due to lack of property interest in land, and ensures that property owners and lessees abide by the use restrictions. *See* Act of Aug. 14, 1997, ch. 394, 1997 N.C. Adv. Legis. Serv. 46. Although the Act and Senate Bill 125 contain similar provisions regarding the enforcement of land-use restrictions, Senate Bill 125 seems to apply to a wider range of activities than just brownfields redevelopment. *See id.*

138. *See* N.C. GEN. STAT. § 130A-310.37(a)(1) (1997). The Act requires the use of brownfields properties to be consistent with local land-use regulations. *See id.*

139. *See id.* § 130A-310.37(2). *See generally* N.C. GEN. STAT. §§ 130A-1 to -460 (Supp. 1997) (establishing state requirements for protection of public health); N.C. GEN. STAT. §§ 143-215 to -215.104u (1996 & Supp. 1997) (establishing state requirements for water pollution control).

140. A "regulated substance" is defined by the Act to be hazardous waste, a hazardous

public health or the environment.[141] Finally, the Act is not intended to: (1) prevent DENR from enforcing remediation standards and requirements that are required by the federal government for federal program authorization or funding;[142] (2) create a defense for illegal disposal of waste or creation of pollution on a brownfields property;[143] or (3) provide relief for failure to exercise due diligence and reasonable care in performing environmental assessments or transaction screens.[144]

To pay DENR's costs of implementing the Act, a Brownfields Property Reuse Act Implementation Account was created.[145] The account is to be funded primarily by fees charged to prospective developers for submitting to DENR proposed brownfields agreements and final remediation completion reports, although the General Assembly may appropriate other money to the account.[146] The Act also requires DENR to submit an annual report to the state Environmental Review Commission evaluating the effectiveness of the Act and providing recommendations for any necessary changes to the Act.[147]

During committee discussions of the Act, sponsors of the legislation specifically stated that the legislation did not apply to sites contaminated by leaking underground storage tanks or to federal Superfund sites.[148] Legislators and participants concerned about this issue apparently believed that these assurances were not enough, at least for Superfund sites, because legislation enacted shortly after the final passage of House Bill 1121 specifically prohibits DENR from entering into a brownfields agreement for a brownfields site that is identified by the EPA as a Superfund site.[149]

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substance, oil, or any other regulated substance subject to regulation under remedial programs for pollution control. *See* N.C. GEN. STAT. § 130A-310.31(11) (1997).

141. *See id.* § 130A-310.37(3).

142. *See id.* § 130A-310.37(7).

143. *See id.* § 130A-310.37(8).

144. *See id.* § 130A-310.37(9).

145. *See id.* § 130A-310.38.

146. *See id.* § 130A-310.38 to .39. The fee charged for a proposed brownfields agreement is $1000, and the fee for a final remediation report is $500. *See id.* § 130A-310.39(a)(1)-(2).

147. *See id.* § 130A-310.40. The Environmental Review Commission is a 12-member committee of the General Assembly established by statute and charged with reviewing environmental issues and actions by state environmental agencies. *See* N.C. GEN. STAT. § 120-70.41 to .47 (1994 & Supp. 1997). The Commission may make recommendations for and draft legislation pertaining to environmental issues. *See id.* § 120-70.43(a)(6).

148. *See, e.g.*, NORTH CAROLINA HOUSE COMM. ON ENV'T, *supra* note 88, at 1 (recording Rep. McComas's testimony that the bill did not apply to these sites).

149. *See* Dry-Cleaning Solvent Cleanup Act of 1997, ch. 392, § 4.5, 1997 N.C. Adv.

In general, the Act addresses some, but not all, of the various elements that commentators have found necessary for effective state brownfield and voluntary cleanup programs. These elements include: (1) clear delineation between low- or medium-priority cleanup sites and high-priority cleanup sites; (2) flexible and identified cleanup standards and procedures allowing cleanups consistent with the proposed future use of the site; (3) oversight of voluntary remediation by certified environmental professionals; (4) public participation; (5) statutory lender liability protection, written assurances of liability protection, and liability protection running with the land; (6) economic incentives for private parties to undertake cleanups; and (7) protection from or defenses to federal environmental enforcement actions.[150] The absence of any of these elements does not necessarily mean that the Act will be any less successful than if they were present. The elements are useful indicators, however, of whether the Act will provide assistance in remediating brownfield sites.

Delineation of Contaminated Sites. Delineation of contaminated sites involves the identification of sites that will be eligible for application of the Act's provisions and those sites that will not be eligible. Most state brownfields programs are limited specifically to contaminated sites not listed on federal or state hazardous waste remediation priority lists, or sites not subject to federal or state enforcement actions.[151] For example, Colorado statutes provide that the state's voluntary cleanup and remediation program does not apply to sites listed as federal Superfund sites, sites subject to corrective action orders or agreements under federal or state hazardous material enforcement programs, or property required to be permitted for treatment, storage, or disposal of hazardous waste.[152] North Carolina's brownfield program, as amended by the later-enacted Dry-Cleaning Solvent Cleanup Act of 1997,[153] explicitly excludes federal Superfund

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Legis. Serv. 6, 34. The bill also made several other minor changes to the brownfields legislation. *See id.* §§ 4.2-4.4, 1997 N.C. Adv. Legis. Serv. at 33-34.

150. The elements discussed in this analysis are listed in Sweeney, *supra* note 25, at 157-65.

151. *See id.* at 157-58.

152. *See* COLO. REV. STAT. § 25-16-303(3)(b) (1997); *see also* FLA. STAT. ANN. § 376.82(1) (West Supp. 1998) (designating sites ineligible for the state's brownfields program); OHIO REV. CODE ANN. § 3746.02 (Anderson 1997) (describing property to which the state's voluntary remediation program does not apply); W. VA. CODE § 22-22-2(b) (Supp. 1997) (defining brownfields to exclude certain sites subject to federal or state corrective action requirements).

153. Dry-Cleaning Solvent Cleanup Act of 1997, ch. 392, 1997 N.C. Adv. Legis. Serv. 6.

sites from the program.[154] However, except for sites subject to remedial action under the state's underground petroleum storage tank program, sites that are subject to other federal or state cleanup enforcement requirements or remedial action programs do not appear to be precluded from the provisions of the Act,[155] which would make sites subject to the state's existing voluntary remediation program eligible for the brownfields program.[156] It is uncertain whether inclusion of different types of contaminated sites in this manner is too broad and will create problems and confusion in administering the brownfields program that will require later clarification.

Use of Appropriate Remediation Standards. In addition to delineation of sites eligible for a brownfields program, one commentator has noted that brownfield projects should include detailed environmental assessment and remediation procedures that provide "realistic cleanup standards [that] enhance and legitimize the remediation of contaminants consistent with the proposed future use of the site."[157] Some state brownfield statutes identify the specific remediation standards that will be applied to a brownfields property.[158] The Act, however, does not specify the cleanup standards that will be applied as part of a brownfields agreement. Indeed, one of the aspects

154. *See id.* § 4.5, 1997 N.C. Adv. Legis. Serv. at 34.

155. *See* N.C. GEN. STAT. § 130A-310.31(b)(3) (1997) (defining "brownfields property" eligible for the program). *See generally* N.C. GEN. STAT. §§ 143-215.94A to .94Y (1996 & Supp. 1997) (establishing the state's leaking underground petroleum storage tank program).

156. The definition of "brownfields property" or "brownfields site" in the Act identifies the properties or sites as those that "may be subject to remediation under any State remedial program." N.C. GEN. STAT. § 130A-310.31(3)(b) (1997). A "remedial program" includes any "program implemented by [DENR] for remediation . . . , including the Inactive Hazardous Sites Response Act of 1997," *id.* § 130A-310.31(12), the Act that includes the existing voluntary remediation program.

157. Sweeney, *supra* note 25, at 158-59. Some commentators have suggested the use of "risk-based" remediation standards, which may be less stringent than adopted cleanup standards, as a means of encouraging brownfields redevelopment. *See, e.g.*, Robert W. Wells, Jr., *Brownfields for Beginners*, FLA. B.J., May 1997, at 74, 76 (discussing benefits of applying risk-based corrective actions in cleanup situations). The Act, however, does not specify the use of risk-based standards, but does say that a prospective developer must provide information to DENR showing that "the brownfields property will be suitable for the uses specified in the agreement while fully protecting public health and the environment instead of being remediated to current standards." N.C. GEN. STAT. § 130A-310.32(a)(2) (1997). As described above, the term "current standards" as used in the Act appears to exclude certain risk-based standards established by the Environmental Management Commission. *See supra* note 100.

158. *See, e.g.*, PA. STAT. ANN. tit. 35, § 6026.304 (West Supp. 1997) (establishing site-specific remediation standards for the state's land recycling program).

of the Act that potential developers of brownfields property may find most attractive is the flexibility embodied in the provisions allowing establishment of cleanup standards on a site-by-site basis consistent with the proposed land use for the property.[159] Allowing remediation standards to be established in this manner, "based on the proposed use of the property, should allow the use of less restrictive remediation standards for industrial and commercial sites, as compared to residential sites."[160] By then providing that the land-use restrictions run with the property and are incorporated into the property's chain of title,[161] the Act attempts to ensure that exposure to contaminants that could result in unacceptable risks are limited by prohibiting activities that are not compatible with the remediation.[162]

Effective Oversight. Although a successful brownfields remediation program normally embodies flexibility in its approach to site cleanup, it has been argued that some form of oversight must be provided to ensure that cleanup procedures are followed.[163] The Act's provisions for a brownfields agreement require prospective developers to provide DENR with information demonstrating compliance with

159. *See* N.C. GEN. STAT. § 130A-310.32(b)-(c) (1997). According to one person involved in the early development of the Act, the proponents of the Act looked initially at Pennsylvania's statute as a model, but later rejected that state's approach, particularly the establishment of statutory cleanup criteria, as being too inflexible. Telephone Interview with Elizabeth P. Yerxa, Partner, Smith Helms Mulliss & Moore, Raleigh, N.C. (Sept. 25, 1997).

160. Weintraub & Gruza, *supra* note 21, at 58. At least one commentator, however, believes that use of site-specific standards may not be necessary for successful cleanup programs:

> A recent trend among the states involves flexibility as to the level of cleanup required for a parcel, depending on the use to which it is to be put; a plot destined for industrial use, for example, may remain somewhat contaminated, but a residential parcel would have to meet the strictest cleanup standards. In addition to the difficult issues of environmental justice created by such a legislative scheme and the possibility that lower standards may contribute to undesirable interstate competition, evidence indicates that purchasers and lenders are willing to proceed under a voluntary program without lowered standards.

Brian C. Walsh, *Seeding the Brownfields: A Proposed Statute Limiting Environmental Liability for Prospective Purchasers*, 34 HARV. J. ON LEGIS. 191, 213-14 (1997).

161. *See* N.C. GEN. STAT. § 130A-310.35 (1997).

162. *See* Anderson, *supra* note 41, at 24. Anderson notes that Michigan's voluntary cleanup program, which provides, in part, for cleanups "based on a site-specific risk assessment that considers a large variety of factors, including reasonably foreseeable land and resource uses," has been successful, bringing about 2000 sites overall into the state's cleanup program. *Id.*; *see also* MICH COMP. LAWS ANN. § 324.20120a (West 1997) (MICH. STAT. ANN. § 13A.20120a (Law Co-op. 1997)) (establishing site-cleanup criteria based on categories of land uses).

163. *See* Anderson, *supra* note 41, at 24.

applicable procedural requirements,[164] and require a statement of the schedule and method for evaluating cleanup actions.[165] These requirements would seem to provide DENR with the opportunity to receive regular reports on the progress of the remediation. Also, other sections of the Act allow persons to request that DENR determine whether particular types of contaminated sites have been remediated in accordance with required cleanup standards for those sites.[166] The Act, however, does not specify the level of supervision or oversight for remediation efforts under a brownfields agreement. A prospective developer of a brownfield property initially must file a Notice of Brownfield Property with DENR for approval,[167] but the content requirements for the Notice do not specify the level of state oversight of the proposed project, nor do they specify that the developer must report regularly to DENR.[168] The provisions of the Act that establish the requirements for a brownfields agreement also do not specify oversight responsibilities or reporting requirements.[169]

The absence of specific oversight and reporting provisions does not necessarily lessen the effectiveness of the Act, and may actually make it more attractive for use. Some state voluntary cleanup programs include provisions requiring state monitoring and oversight of a remediation effort.[170] However, it has been noted that state agencies, often with a limited number of personnel and resources, may not be able to conduct oversight and monitoring in a timely manner, thus leading to delays in reviewing project elements and

164. *See* N.C. GEN. STAT. § 130A-310.32(a)(5) (1997).

165. *See id.* § 130A-310.32(c)(1)f.

166. *See id.* § 130A-308 (allowing a request for a determination of compliance for corrective action for hazardous waste treatment, storage, or disposal facility); *id.* § 130A-310.7(c) (providing for a request for determination of compliance for remediation of hazardous substance contamination); N.C. GEN. STAT. § 143-215.3(f) (Supp. 1997) (providing for a request for determination of remediation compliance with groundwater standards and classifications); *id.* § 143-215.84(e) (providing for a request for determination of compliance for remediation of sites contaminated by underground storage tanks).

167. *See supra* note 127 and accompanying text.

168. *See* N.C. GEN. STAT. § 130A-310.35(a) (1997).

169. *See id.* § 130A-310.32.

170. *See, e.g.*, IND. CODE ANN. § 13-25-5-15 (Michie 1996) (requiring the state environmental department or a departmental contractor to "[o]versee and review the implementation of the voluntary remediation work plan"); MO. ANN. STAT. § 260.567 (West Supp. 1998) (establishing procedures for oversight by state Department of Natural Resources for voluntary remediation programs); VT. STAT. ANN. tit. 10, § 6615a (1997) (providing that prospective developers of brownfield properties can "request the assistance of the secretary [of the state environment department] in reviewing and overseeing work plans to investigate, abate, remove, remediate and monitor those properties").

consequent delays in cleanup efforts.[171] Other states have established statutory schemes that allow private remediation contractors and laboratories to provide oversight of voluntary remediation.[172] North Carolina, for example, provides for this type of oversight and management in its existing voluntary remediation program.[173] Although reporting requirements may sacrifice some flexibility, it might be beneficial for the Act to provide for regular monitoring reports by the prospective developer, or to extend the certified environmental professional provisions of the state's existing voluntary remediation program to the Act.

Public Participation. For a brownfield redevelopment project to be successful, it is essential that members of the public, particularly the community members most affected by the project, are involved in or at least aware of the project.[174] As one commentator notes, "[a] favorable response from the community to a proposed brownfield redevelopment project that involves risks is more likely when legitimate representatives of neighborhood interests have been involved in a meaningful decision-making process."[175] Unfortunately, a number of states provide for minimal public participation in voluntary cleanup and brownfield programs.[176] By limiting public

171. *See* Anderson, *supra* note 41, at 24.

172. *See, e.g.*, OHIO REV. CODE ANN. § 3746.10(B)(1)(b) (Anderson 1997) (requiring the use of "services of a certified professional to verify that the property and any remedial activities undertaken at the property in connection with a voluntary action comply with applicable standards").

173. *See* N.C. GEN. STAT. § 130A-310.9(c) (1997).

174. *See generally* Andrew, *supra* note 16, at 31 (discussing the stakeholder issues in brownfields redevelopment, particularly community interests); Eisen, *supra* note 26, at 972-77 & nn.382-94, 998-1017 (providing extensive discussion and identification of state remediation programs and their public participation requirements); Stephen C. Jones & Brooks M. Beard, *How to Develop a Brownfield*, ENVTL. COMPLIANCE & LITIG. STRATEGY, Oct. 1996, at *1, *4, *available in* WESTLAW, ENVTCLST database (discussing community involvement as an element of a successful brownfields project); Weintraub & Gruza, *supra* note 21, at 69-70 (discussing the need for public and private dialogue regarding brownfields redevelopment).

175. Eisen, *supra* note 26, at 1009-10 (footnote omitted).

176. *See id.* at 972-73. Professor Eisen comments that

> Ohio makes no reference to community involvement in individual brownfield development projects. Pennsylvania allows for public participation beyond notice only if requested by the affected municipality and then only if the developer chooses to cleanup [sic] a site using the site-specific cleanup standard. Illinois provides that the developer may elect to develop a "community outreach plan," but requires only that the state develop guidance to assist developers in reaching out to the affected community. Some states provide that the developer may elect to conduct further community outreach efforts; Rhode Island mandates this.

Id. (footnotes omitted); *see also* Thomas G. Kessler, *The Land Recycling and*

participation in a redevelopment project, states may be attempting to avoid possible delays in or deterrents to remediation of a particular site.[177] Such actions, however, can preclude opportunities for brownfields developers to incorporate community concerns into their project goals and to build community support for a project.[178] They also can create resistance to a project "due to a lack of input in threshold decisions."[179]

The Act's provisions for public participation in the development of a brownfields project should overcome a number of these concerns. The Act requires that "[a] prospective developer who desires to enter into a brownfields agreement ... notify the public and community in which the brownfields property is located of planned remediation and redevelopment activities."[180] The methods for making this notification—submitting a Notice of Intent to Redevelop a Brownfields Property to DENR,[181] publishing the Notice in local newspapers,[182] submitting the Notice to affected local governments,[183] and providing opportunities for a public meeting[184]—will assist the public in learning about the proposal. It is incumbent on brownfields

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Environmental Remediation Standards Act: Pennsylvania Tells CERCLA Enough Is Enough, 8 VILL. ENVTL. L.J. 161, 193 (1997) (noting that under Pennsylvania's Land Recycling Act, citizens interested in a cleanup project must convince a municipality to request development of a public participation plan). *But cf.* James W. Creenan & John Q. Lewis, *Pennsylvania's Land Recycling Program: Solving the Brownfields Problem with Remediation Standards and Limited Liability*, 34 DUQ. L. REV. 661, 693 (1996) ("Although public participation in the complex remediation process [under Pennsylvania's law] may be limited, the open-door policy allows citizens to maintain a voice in a problem that affects the entire community."). For descriptions of public participation requirements in 17 state voluntary cleanup programs, see generally U.S. GEN. ACCOUNTING OFFICE, *supra* note 58, at 43-45, 59.

177. *See* Eisen, *supra* note 26, at 972; Sweeney, *supra* note 25, at 160.

178. Michael Sweeney suggests that public participation in brownfields development can serve project developers in their public relations efforts regarding the project. He comments that, "with the proper amount of 'spin,' ... [project developers] can publicize the environmental protection benefits associated with the redevelopment of impaired property.... Moreover, volunteers can take advantage of public notice and comment to dispel the potential for Not-In-My-Backyard complaints brought on by project opponents." Sweeney, *supra* note 25, at 160.

179. Eisen, *supra* note 26, at 1006. Professor Eisen notes that even in states that require some form of public participation, community involvement usually will come after it already has been decided that the site will be developed, how the site will be used, and what the proposed cleanup standard will be. *See id.* "If the community perceives that it has no opportunity to influence these decisions, projects may be thwarted by local resistance." *Id.* at 1006-07 (footnote omitted).

180. N.C. GEN. STAT. § 130A-310.34(a) (1997).

181. *See id.*

182. *See id.*

183. *See id.*

184. *See id.* § 130A-310.34(c).

developers, however, to ensure adequate public participation in the project's development outside of these statutory requirements and options. Including affected community members in discussions about redevelopment of brownfield sites prior to developing remediation plans, and perhaps before submitting notices to the state, will prevent misunderstandings and reduce opposition to cleanups that may involve remediation to standards different than those currently required. Certain authors also have suggested that it is important to ensure that community members are involved to some degree in identifying the appropriate, but not necessarily the specific, environmental standards that will be employed at a brownfields site.[185]

At least one commentator has suggested the creation of statutory mechanisms for providing early public participation in brownfields remediation projects. These include requiring a "community impact statement" or mandating the creation of community working groups.[186] Although these mechanisms may foster greater initial public involvement in a remediation process, they seem to create another level of review and control that may have a chilling effect on potential voluntary efforts to redevelop brownfields properties. The Act, in line with its general notion of flexibility, does not mandate these methods. It does seem appropriate, however, for the state to ensure adequate support for a project within the affected community before entering a brownfields agreement. Models fostering early community involvement in brownfields projects can ensure adequate voluntary participation. Such models include holding public dialogues or forming (nonmandatory) working groups to discuss a project prior to its initiation to incorporate community concerns into the decision-making process.[187]

Liability Protections. Public participation in the remediation of brownfields sites is an important element to ensure community acceptance of redevelopment of such sites. In order to induce prospective developers of brownfields sites even to attempt such an

185. *See* BROWNFIELDS: A COMPREHENSIVE GUIDE TO REDEVELOPING CONTAMINATED PROPERTY, *supra* note 33, at 188-89. The authors note that "[t]he interests of the community [in appropriate cleanup standards] . . . will be represented only if community members are given the opportunity to participate up front and are properly equipped to engage in meaningful and knowledgeable interaction." *Id.* at 189.

186. *See, e.g.*, Eisen, *supra* note 26, at 1015-20 (suggesting the establishment of these types of processes).

187. *See* BROWNFIELDS: A COMPREHENSIVE GUIDE TO REDEVELOPING CONTAMINATED PROPERTY, *supra* note 33, at 189-91 (describing the public dialogue and working group processes in the setting of brownfields redevelopment).

effort, however, assurance must be given that liability protections will be provided. As mentioned earlier, the Act provides that a prospective developer who enters into a brownfields agreement with DENR and who complies with the terms of the agreement will not be held liable for remediation of contaminants identified in the agreement.[188] This liability protection extends to lenders or fiduciaries financing the remediation or redevelopment.[189] Commentators have noted that without liability protection, lenders are unlikely to finance a redevelopment project until cleanup is completed and the state has signed-off on liability protection, thus limiting the availability of up-front financing for site investigation and remediation.[190]

With respect to providing lender protection, the Act mirrors the provisions of other state statutes that provide similar general assurances.[191] It is unclear, however, whether general provisions of this nature are sufficient to induce "the degree of 'comfort' necessary to bring a lender into a Brownfields transaction."[192] Several state statutes are explicit in the protection provided to lenders, using language that specifically defines the activities of a lender that would exclude it from liability.[193] One commentator has noted that to be effective, most state lender liability protection provisions "provide lenders with notice of when their attempts to protect their investments will be subject to environmental liability" and define "active participation in management" as the delineation point "at which lenders may exercise control over a Brownfields transaction" and thus become subject to potential liability.[194] Also, it has been suggested that

188. *See supra* notes 105-07 and accompanying text.

189. *See* N.C. GEN. STAT. § 130A-310.33(a)(1)-(5) (1997).

190. *See* Sweeney, *supra* note 25, at 161; *see also* Margaret Murphy, *Brownfields Sites: Removing Lender Concerns as a Barrier to Redevelopment*, 113 BANKING L.J. 440, 443-44 (1996) (describing specific lender concerns regarding brownfields sites).

191. *See* MINN. STAT. ANN. § 115B.175, subd. 6(2) (West 1997); W. VA. CODE § 22-22-18(a)(7) (Supp. 1997).

192. Sweeney, *supra* note 25, at 161.

193. *See, e.g.*, MD. CODE ANN., ENVIR. § 7-201(x)(2) (Supp. 1997) (providing detailed exclusion for lenders as responsible parties for voluntary remediation site contamination); MICH. COMP. LAWS ANN. § 324.20101a (West 1997) (MICH. STAT. ANN. § 13A.20101a (Law Co-op. 1997)) (describing the actions that would lead a lender holding a security interest in a brownfields site to be found to have participated in the management of the site and thus subject to liability); OHIO REV. CODE ANN. § 3746.26 (Anderson 1997) (establishing detailed provisions for exempting lenders from liability for contamination at voluntary cleanup sites); PA. STAT. ANN. tit. 35, §§ 6027.1-6027.14 (West Supp. 1997) (creating, as part of state's land-recycling program, the Economic Development Agency, Fiduciary and Lender Environmental Liability Protection Act).

194. Sweeney, *supra* note 25, at 161-62.

"concrete parameters must be established through which lenders can 'workout' loans and otherwise protect financing secured by impaired property."[195] Whether it is necessary to establish these latter parameters by statute, as well as the more detailed exemption language found in certain other states,[196] is a question of how comfortable lenders will be with general statements of liability protection such that they will engage in financing brownfields redevelopment.[197]

One element that brownfields and voluntary cleanup programs usually provide—written assurances of protection from liability for future enforcement actions—is not specifically identified in the Act. These assurances, which ordinarily take the form of covenants not to sue or certificates of completion, are viewed as "non-economic incentives integral to the success of a Brownfields restoration and voluntary cleanup program."[198] The bill creating the Act does provide for a type of certificate of completion by allowing persons to request that DENR determine whether particular types of contaminated sites have been remediated to current standards for the type of remediation required at that site and issue written notification that no further remediation is necessary.[199] This written notification, however, is not identified as a mechanism for ensuring protection from future liability, although it likely could be used as such.[200]

The absence of a statutory requirement for a specific, written covenant not to sue tied to liability protection could be handled through negotiations between DENR and a prospective developer as part of the development of a brownfields agreement. Indeed, the Act states that a prospective developer entering into a brownfields agreement who complies with the agreement is not liable for "remediation of areas of contaminants identified in the brownfields agreement" as long as public health and the environment are not

195. *Id.* at 162. The author explains "workout" provisions as restructuring terms of a security interest, requiring additional rent, exercising forbearance, and other actions by which a lender may prevent the default of a brownfields property redeveloper and protect the lender's security interest in the property. *See id.* at 162 n.352 (citing MICH. COMP. LAWS ANN. § 324.20101a(3) (West 1997) (MICH. STAT. ANN. § 13A.20101a(3) (Law Co-op. 1997))).

196. *See supra* note 193 and accompanying text.

197. *See* Murphy, *supra* note 190, at 449-50. The author comments that states have taken differing approaches in either providing explicit or implicit protection for lenders from liability concerns, and that "[f]or lenders, these implicit protections may be as solid as explicit exemptions." *Id.* at 449.

198. Sweeney, *supra* note 25, at 163.

199. *See supra* note 166 and accompanying text.

200. *See* Anderson, *supra* note 41, at 25 ("Liability protection offered by agency sign-off . . . generally consists of . . . a no-further-action letter or certificate of completion.").

endangered.[201] Thus, the agreement itself may serve as sufficient written assurance. It is unclear, however, whether this will be sufficient to provide comfort to a prospective developer that the state will not pursue enforcement actions against the developer and to "add[] value to [a] lender's underlying collateral [that] ... can eliminate some of the financial concerns of lenders."[202]

An important link in ensuring that liability protection is available for prospective developers, subsequent purchasers, and lenders is a requirement that the liability protection run with the land.[203] Incorporating this protection, and other provisions such as land-use restrictions, into the chain of title gives subsequent purchasers notice of the status of the property and of any remaining contaminants on the property.[204] Although the Act provides liability protection from future remediation requirements to future owners of a brownfields property and to successors and assigns of persons originally receiving the liability protection,[205] it does not specifically provide that any covenants not to sue or other written assurances of liability protection are to be incorporated into the property's chain of title. Notices of Brownfield Property, which can incorporate land-use restrictions on the property, are required to be recorded with the deed for the property, however.[206] In addition, the Act provides that in transactions involving the property, the deed or other instrument of transfer must show that "the brownfields property has been classified and, if appropriate, *cleaned up as* a brownfields property."[207] This requirement may serve to ensure that a future owner or purchaser of the property is placed on notice that the property has been remediated as a brownfields site, but it is unclear if it will provide firm assurance of liability protection to such owners or purchasers. Some states have taken the next step by requiring the incorporation of certificates of completion for remediation,

201. *See* N.C. GEN. STAT. § 130A-310.33(a) (1997).

202. Murphy, *supra* note 190, at 449 n.42; *see also* MASS. ANN. LAWS ch. 21E, § 3A(j)(1) (Law Co-op. 1996) (authorizing the state to enter into covenants not to sue); OHIO REV. CODE ANN. § 3746.12 (Anderson 1997) (providing for covenants not to sue); Anderson, *supra* note 41, at 25 (noting that providing liability protection through required covenants not to sue is the trend in recent state voluntary cleanup or brownfields proposals); Geltman, *Recycling Land*, *supra* note 65, at 9 (commenting that most state programs provide that formal covenants not to sue will be issued once remediation is completed).

203. *See* Sweeney, *supra* note 25, at 164.

204. *See id.*

205. *See* N.C. GEN. STAT. § 130A-310.33(a)(2), (4) (1997).

206. *See id.* § 130A-310.35(b)-(e).

207. *Id.* § 130A-310.35(d) (emphasis added).

covenants not to sue, or other written assurances in the property's deed.[208]

Economic Incentives and Coordination with Federal Activities. The final two elements that have been identified as keys to effective brownfields programs—economic incentives for private parties to undertake cleanups, and protection from or defenses to federal environmental enforcement actions[209]—are either not specifically identified as such or are not present in the Act. The Act's provision for liability protection may provide an economic incentive that may enhance lender and developer comfort enough to encourage financing of brownfields projects.[210] In addition, the development of case-by-case cleanup standards for brownfields properties may result in reduced costs of cleanup. Beyond these provisions, however, the Act does not provide other state economic incentives or funding programs to encourage redevelopment. Other states have recognized financial incentives of this type as important components of their brownfield redevelopment programs.[211] The Act does provide for payment of fees by prospective developers for various agreements and reports submitted to DENR.[212] However, the funds generated from these fees, and any other funds appropriated by the General Assembly, are to be used to defray DENR's costs of implementing the Act rather than to provide grants or loans for brownfields redevelopment.[213] The General Assembly may develop these types of incentives once the level of interest in and effectiveness of the program is ascertained.

The ability of a state to provide protection from or defenses to federal environmental enforcement actions is limited.[214] According to

208. *See, e.g.*, OHIO REV. CODE ANN. § 3746.14(A) (Anderson 1997) (providing that covenants not to sue must be recorded with the deed for remediated property and run with the land).

209. *See* Sweeney, *supra* note 25, at 162-63, 165.

210. *See* Andrew, *supra* note 16, at 29 (noting that state efforts to limit liability help "reassur[e] third-party financing efforts").

211. *See* Smary & DeWitt, *supra* note 34, at 283-84. The authors indicate that certain states provide financial incentives, such as tax incentives, loan programs, and grant programs. *See id.*; *see also* MICH. COMP. LAWS ANN. § 208.38d (West 1997) (MICH. STAT. ANN. § 7.558(38d) (Law Co-op. 1997)) (creating credits against state single-business tax for investment at brownfield sites); OHIO REV. CODE ANN. § 122.16(B)(1) (Anderson 1997) (creating tax credits against corporate and state income taxes); PA. STAT. ANN. tit. 35, §§ 6026.702 (West Supp. 1997) (establishing grant and loan programs for brownfield redevelopment).

212. *See* N.C. GEN. STAT. § 130A-310.39 (1997).

213. *See id.* § 130A-310.38.

214. *See* Murphy, *supra* note 190, at 453 (noting that despite state lender liability limitations, "state brownfields programs cannot address the additional uncertainties

one commentator, states have attempted to address this problem by excluding federal sites from brownfields or voluntary cleanup programs.[215] In addition, states have attempted to address potential federal liability by entering negotiations with, and, in some instances, signing memoranda of agreement with, the EPA that provide, inter alia, that the EPA will not pursue enforcement actions at sites that have been remediated through a voluntary cleanup or brownfields program.[216] Although some commentators have encouraged this action,[217] others have noted that such memoranda of agreement do not provide substantive protection from potential EPA actions.[218] North Carolina has not entered into a memorandum of agreement,

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presented by the potential application of federal laws to these sites"); Walsh, *supra* note 160, at 210 (noting that "because [state voluntary programs] operate at the state level, they cannot provide assurance that the federal EPA will not pursue the owner for further cleanup").

215. *See* Walsh, *supra* note 160, at 210. The author notes that in other instances, "the landowner must rely on federal-state comity, the small scale of the contamination, or the federal government's sense of public relations and assume that the EPA will not attack property which has already received a clean bill of health from a state government." *Id.* (citation omitted).

216. *See* U.S. GEN. ACCOUNTING OFFICE, *supra* note 61, at 48-49 (listing 10 states that, as of 1995, had entered into memoranda of agreement); Andrew, *supra* note 16, at 30 (identifying Illinois as another state that has entered into a memorandum with a similar exemption); Goff-Sanders, *supra* note 28, at 152 (noting that Minnesota entered into a memorandum of agreement with the EPA in 1995 to provide relief from Superfund liability for persons voluntarily cleaning up sites). Colorado takes an additional step by providing that if the EPA

> indicates that it is investigating a site which is the subject of an approved voluntary clean-up plan or no action petition, the department shall actively pursue a determination by the [EPA] that the property not be addressed under the federal [Superfund] act or, in the case of property being addressed through a voluntary clean-up plan, that no further federal action be taken with respect to the property at least until the voluntary clean-up plan is completely implemented.

COLO. REV. STAT. § 25-16-309(2) (1997).

217. *See, e.g.*, Goff-Sanders, *supra* note 28, at 152.

218. *See, e.g.*, Mark D. Anderson, *The Limits of Innovative Cleanup Laws: A State Update*, ENVTL. COMPLIANCE & LITIG. STRATEGY, Mar. 1997, at *1, *4, *available in* WESTLAW, ENVTCLST Database. Mark Anderson comments that

> [u]nfortunately, the memoranda of agreement that have been entered into thus far simply provide a policy statement that [the EPA] will refrain from taking action at the sites addressed in the agreement. For those states that are still negotiating a state memorandum of agreement (SMOA), the picture is even less attractive. Draft EPA guidance on SMOAs includes language ensuring that there is nothing in the SMOA that prevents EPA from taking action at any of the sites identified in such agreements .... Prospective developers and purchasers are unlikely to have great confidence in a simple policy statement that could be reversed without great effort on the federal government's part.

Id.

although DENR is reviewing the issue.[219]

As it moved through the General Assembly, the Act encountered little resistance or opposition.[220] Both the business community and the environmental community supported the final version of the legislation.[221] DENR, although concerned about the uncertain funding and lack of additional resources provided in the Act,[222] was given an additional mechanism to help the state remediate contaminated sites in the state. Despite this support, the actual ramifications and, in some cases, the interpretation of the Act, are uncertain. Questions remain about how attractive the Act will be for redevelopment of brownfields if only prospective purchasers or developers of the property can take advantage of its provisions.[223] The question of the type and extent of remediation contained in brownfield agreements will be decided on a case-by-case basis pursuant to guidance that will have to be developed by DENR.[224] In addition, although legislative materials indicate that the Act was designed to address brownfields created at industrial sites,[225] staff of DENR have indicated that application of the Act likely will not be restricted to just industrial sites.[226] Regardless of these questions, some observers, while acknowledging the shortcomings of the legislation, believe that the Act is an important step that will require modification over time to address concerns fully and to become a

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219. Whisnant Interview, *supra* note 11.

220. *See* NORTH CAROLINA HOUSE COMM. ON ENV'T, *supra* note 88, at 1 (noting Rep. McComas's testimony that "he was not aware of any opposition to the bill"); *see also* NORTH CAROLINA HOUSE COMM. ON FIN., *supra* note 91, at 4 (noting similar testimony).

221. *See* Rawlins, *supra* note 72, at A3. The executive director of the NCCBI indicated that the brownfields legislation "had been the group's main environmental legislation of the [legislative] session." *Id.*

222. Whisnant Interview, *supra* note 11.

223. It has been noted that

> it is unclear how much the bill will actually be utilized, since it excludes from its protection any responsible party who may have caused or contributed to the contamination at the site. This exclusion will, undoubtedly, prevent the bill from being used to cleanup many brownfields properties that continue to be owned or operated by entities who would be deemed to have caused or contributed to the contamination of the property.

Case & Anderson, *supra* note 20, at 4.

224. Nicholson Interview, *supra* note 19; *see* Letter from Grover Nicholson, Head, Federal Remediation Branch, Superfund Section, Division of Waste Management, North Carolina Department of Environment and Natural Resources, to author (Feb. 6, 1998) (on file with the *North Carolina Law Review*).

225. *See* NORTH CAROLINA HOUSE COMM. ON ENV'T, *supra* note 88, at 1 (containing statement by Committee Counsel that "[House Bill 1121] provides that these sites be cleaned up for industrial use").

226. Nicholson Interview, *supra* note 19.

viable mechanism for redevelopment.[227]

In adopting the Act, the North Carolina General Assembly established a framework for providing prospective developers of contaminated property with an incentive to accomplish remediation in a less costly manner with at least some assurance of limited liability from state enforcement actions. The ultimate effect of the Act will be determined in part, however, by whether there is sufficient interest by the development community and local governments in using the provisions of the Act to redevelop brownfields, particularly because parties responsible for the contamination are excluded from the Act. Questions also remain regarding how the state will implement its responsibilities under the Act, including what method of establishing cleanup standards the state will employ and how it will structure brownfields agreements. In addition, it will be necessary to assess the Act to determine if it provides sufficient opportunity for public participation and involvement in the brownfields redevelopment process. Overall, however, the Act should assist in "reusing industrial sites as industrial properties and preventing unnecessary consumption of pristine property."[228]

DAVID B. HAWLEY

227. *E.g.*, McComas Interview, *supra* note 11.
228. Geltman, *Recycling Land*, *supra* note 65, at 10.